UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
NEW YORK BRANCH OFFICE
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

VERIZON and its subsidiary
TELESECTOR RESOURCES GROUP

and **Case Nos. 2-CA-32858**
2-CA-32982
LOCAL 1108, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO **2-CA-33512**

Geoffrey Dunham, Esq.
New York, NY
Counsel for the General Counsel.
Arthur G. Telegen, Esq. & Robert A. Fisher, Esq.
(Foley Hoag, LLP)
Boston, MA
Counsel for the Respondent.
Lowell Peterson, Esq.
(Meyer, Suozzi, English & Klein, P.C.)
New York, NY
Counsel for the Charging Party.

DECISION

Statement of the Case

STEVEN FISH, Administrative Law Judge. Pursuant to charges and amended charges filed Case Nos. 2-CA-32858, 2-CA-32982, and 2-CA-33512, by Local 1108, Communications Workers of America, AFL-CIO, herein called the Union or Local 1108, on various dates between March 13, 2000[1] and January 4, 2001, the Director issued an Order Consolidating Cases Complaint and Notice of Hearing on January 30, 2002, which complaint was subsequently amended on April 19, 2002, and again on the record.

The Complaint as amended, alleges that Verizon, Inc. (herein) and its subsidiary Telesector Resources Group, herein called Respondent, violated Sections 8(a)(1), (3) and (4) and (5) of the Act.

The trial was held before me in New York, New York on May 29, 30, 31, July 22, 23, and 24 and August 5 and 6, 2002.

The Complaint alleges that Respondent violated Sections 8(a)(1) and (5) of the Act by failing to apply its contract with the Union to a group of employees referred to hazardous materials employees. (Hazmat employees,) or alternatively by failing to accrete the Hazmat workers to an existing unit represented by the Union. It is further alleged that Respondent violated Sections 8(a)(1), (3) and (4) by discharging the Hazmat employees because they

[1] All dates herein referred to are in 2000, unless otherwise indicated.

sought to join the Union, engaged in other protected concerted activities, and in retaliation for charges filed with the National Labor Relations Board.

The trial also involved a number of issues and defenses raised by Respondent, including whether the Hazmat employees are employees of Respondent, whether the charges are barred by Section 10(b) of the Act, and whether the charges should be deferred to the parties' contractual grievance procedure.

Based upon the entire record, including my observation of the demeanor of the witnesses, and the briefs filed by parties, I issue the following:

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

Respondent is a corporation with an office and place of business at 1095 Avenue of the Americas, New York, NY and other locations, and is engaged in providing telephone communications and related services.

Annually, Respondent derives gross revenues in excess of $100,000 and purchases and receives at its facility, goods and materials valued in excess of $50,000 directly room points located outside the State of New York.,

Respondent admits and I so find that it is an employer within the meaning of Section 2(2), (6) and (7) of the Act.

I also find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. FACTS

A. Background

American Telegraph and Telegraph (AT&T) prior to 1984, was the parent company of various local and long distance companies, and operated through a number of subsidiaries. In 1984, AT & T was broken up, pursuant to Court decree, and these various corporate subsidiaries were spun off as separate independent entities. Verizon is the successor to a number of different entities, such as Bell Atlantic and New York Telephone and Telegraph. TRG is a related company, and provides logistical supply and warehouse services.

Various employees of Respondent have been represented by various locals of the CWA for many years. Respondent has executed a number of collective bargaining agreements, some directly with locals of the CWA, and some including the two contracts in issue here, between Respondent and the CWA District one.

The "plant contract" is between Verizon and TRG and CWA District One, and covers employees who were included in the unit as of August 31, 1991, and whose occupational classifications are listed in Article 31, and which classifications were part of New York Telephone Company's plant, network operations, customer services, technical services, engineering and facilities organizations. Article 31 of the Agreements lists a number of classifications, including " Central Office Technician", (COT). The salary for this position, effective August 4, 2002 the last year of the current collective bargaining agreement between

the parties, ranges from starting salaries from $312.00 per week to $323.00 depending on work zone location, to a maximum salary, after 60 months of from $1,192.50 to $1,218.00 again depending on location.

The "materials" or TRG contract is between CWA District One and TRG only, and covers all TRG employees in New York State whose occupational classifications appear in Article 31. The latter article lists a number of classifications, including "material equipment technician." The starting salary for this classification, as of August 4, 2002 ranges from $371.00 to $387.00, and the maximum salary, reached after 48 months, ranges from $1,066.00 to $1,083.00, again depending on location and zone.

Under all of the various contracts between CWA and Respondent covering New York State Employees, CWA represents approximately 30,000 employees.

All of the contracts contain broad arbitration language, providing for arbitration of any grievance relating to among other items, "the true intent and meaning of this Agreement."

Further both the plant and materials contracts, contain clauses relating to contracting out of work. Under the materials contract, Respondent agrees that it will not "contract out work if such contracting out will cause, currently and directly, layoff from employment with the Company, part-timing or downgrades of present employees." The plant contract, prohibits contracting out if it, "will cause, currently and directly, layoffs from employment with the Company or part-timing of present employees."

Bargaining is conducted at national regional and local levels for these contracts. While not contract holders, the CWA locals are responsible for policing the various contracts. Although the locals can file grievances, the decision on whether to take cases to arbitration, is made by the National CWA. Local 1108 represents employees under both the plant and materials contracts in their geographical location.

Some of Respondent's employees are represented by IBEW Local 2213, which represents commercial employees located in upstate New York. Respondent also employs a number of employees who are not represented by any union, including fuelers, engineers, account managers, financial employees and account executives. Respondent refers to non-represented employees as "managers", whether or not they possess any supervisory duties.

CWA and Respondent are parties to an agreement relating to neutrality and card check recognition. It provides that if the CWA presents authorization cards signed by majority of employees in an appropriate unit, Respondent will recognize the union as the representative of such employees. The parties have had disputes concerning the meaning and application of this agreement.

B. Removal of Telephone Equipment Prior to the Breakup of AT&T

Prior to 1984, AT&T and its various subsidiaries, including New York Telephone (NYT), and Western Electric Company (Western Electric) performed all aspects of telephone service, including the removal of retired equipment. The employees of these entities were represented by the CWA.

The retired equipment was removed from frames, which is a structure located in central offices, to which is attached telephone equipment. After the equipment was removed or purged from the frames, it was sent to another subsidiary, Nassau Smelting and Refining Co., (Nassau

Smelting) where it was recycled into scrap. The retired equipment sent to Nassau Smelting, often included various hazardous materials still attached or in boxes, such as batteries, mercury relays, radioactive tubes and PCB Oils. Employees of Nassau Smelting would break up or discard these materials without regard for environmental or safety concerns.

Employees of Nassau Smelting were represented by Mine & Mill Workers Union, not the CWA. Bill Warren who later became responsible for the Hazmat team worked for Nassau Smelting, and was not a member of a CWA represented unit.

Beginning in the early 1980's, there was a recognition that certain materials on frames, such as radioactive tubes, mercury relays, lubricating oils, and PCB's were hazardous and needed to handled and disposed of such. The disposal of these materials was regulated by various Government Agencies. The work was performed by employees of Western Electric. Once the frames were purged of the Hazardous materials, employees of Western Electric, would dismantle the rest of the frame, which is referred to as "rip outs".[2]

C. The Divestiture of AT&T

In 1984, AT&T was broken up by Court decree, and its former subsidiaries became separate entities. Thus New York Tel and New England Tel combined to form NYNEX. NYNEX established a subridiary company *NYNEX Material Enterprises Co.*, which later became TRG. TRG was responsible for warehousing, Logistics, supplies and upgrading equipment and employed chauffeurs, storekeepers, warehousemen and truck drivers.

Western Electric was also spun off as a separate company after the breakup. At that time, rip out work was performed by vendors through a bidding process. Western Electric was among the contractors that would frequently be selected to perform this work. CWA did not object to this result, since Local 1190 of the CWA represented Western Electric employees. In fact, CWA pushed for the rip out work to be performed by Western Electric, rather than other vendors.

On occasion, Respondent would assign its own employees to perform rip out's, rather than assign it to contractors. There was an understanding reached between New York Tel and CWA to use surplus COT's to perform such work, primarily between 1993 and 1996.

The removal of hazardous material from frames after divesture, was initially performed by a group of six retired Western Electric employees, including Burt Quildon.[3] There retirees were employed by Butler, a temporary payroll agency. Additionally, Respondent would also at times use a vendor Chem Nuclear to remove hazardous materials from frames.

After the hazardous materials are removed, the frames were generally ripped out by the vendor who had won the bid. The two functions are not done at the same time - the purging of hazardous materials is done first - and are not done by the same vendors.

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[2] While as noted, Western Electric employees represented by the CWA, performed both rip out and hazardous materials removal prior to the divesture of AT&T, the record does not reflect the bargaining unit represented by the CWA, nor the job classifications of the Western Electric employees, performing this work.

[3] Most of these individuals were managers at Western Electric.

D. The Formation of the Hazmat team

In the late 1980's, Respondent determined that three asbestos containing components, line card resistors, ebony boards and washers, needed to be purged from the frames, prior to any rip out. Since there were hundreds of line card resistors on frames, Respondent decided to no longer use the retirees, but to form a Hazmat team. The team was formed by Quildon, who as noted, was one of the retirees, and an employee of Butler, in conjunction with Bill Warren. Warren was a NYNEX employee in the Environmental Department of TRG.

The members of the Hazmat team were hired primarily through word of mouth, and were interviewed by Warren or other officials of Respondent.

One employee, Abimbola Lana learned about the position from the Department of Labor, and applied for the job, from a listing of asbestos contractors, which included TRG.

None of the employees were told during their initial interviews that they would be employed by Butler, or a payroll agency. They were informed during the interviews of their salaries, but nothing further. Shortly after being hired, the employees met with representatives of Butler, where they signed tax documents, and were informed that Butler would pay their salaries, provide medical benefits, if employees chose to participate, as well as offering a 401- plan, paid vacations, and paid holidays.

Respondent decided to use a payroll agency such as Butler to perform this work, because it believed that the work was going to be temporary, and last no more than a year and a half.

In 1997, the Hazmat employees were notified that they would be paid by Win-Pay. Win-Pay had already been under contract with Respondent to provide both payroll and temporary staffing services to Respondent. Win-Pay, in connection with providing temporary workers, would screen hire and recruit employees for Respondent. However, with respect to the Hazmat team, Win-Pay would not hire or recruit employees, but under its contract with Respondent, acknowledges that it is the employer of these individuals,

While the contract also reflects that Win-Pay agrees to provide supervision of any employees assigned to Respondent, in practice, this provision was not complied with. In fact, the employees were supervised and directed in their work, by various officials of Respondent, such as Bill Warren, and later Valerie Powell or Cecil McIntosh.

Pay raises for the Hazmat team was determined by Respondent's representatives, and Win-Pay was notified by Respondent to effectuate the raises.[4] If employees had problems with their paycheck, they might discuss it with Ray McCourt, a representative of Win-Pay, but usually the matter would be referred to Respondent for disposition.

Win-Pay did pay the salaries of the Hazmat team and withheld all payroll taxes, social security and 401 K plan contributions. Win-Pay offered the employees a medical plan as did Butler, as well as paid holidays. However, none of the employees took advantage of the offer of a medical plan. Win-Pay also did not offer the employees paid vacations, as Butler had

[4] While there is some evidence that Bert Quildon, who was also employed by Win-Pay was involving in recommending wage increases, it is clear that the decision to grant increases was made by Respondent, and not by Win-Pay.

previously provided.[5]

Further, issues such as overtime, time-off, promotions, discipline, hours, and expense reimbursement were decided upon by representatives of Respondent, who would then notify Win-Pay of the action taken or change made. For example, Powell in consultation with McIntosh, demoted employee Michael George, and promoted Abimbola Lana to George's position. Bill Warren suspended Michael George and Powell approved the suspension employee James Pondo.[6]

When the team was transferred to the jurisdiction of Cecil McIntosh in January of 1998, the employees were receiving reimbursement for travel from their home to 140 West Street, where they reported to work. McIntosh changed this practice, because it was inconsistent with Respondent's policy. Thus thereafter, consistent with Respondent's policies, the employees received reimbursement only for travel from 140 West Street to whatever job site they were assigned to perform their work.

Additionally, during the course of their employment on the Hazmat team, employees George, Sebro and Powell (before she became a manager), had dedicated desks, phone lines and voice mails at Respondent's facilities.

Each of the Hazmat team members received specialized training to equip them with the skills needed in handling hazardous materials. The arrangements were made for team members to take the required classes by Warren or other officials of Respondent, which also paid for these classes. Once completed the team members were issued certificates indicating that they were qualified in handling asbestos and other hazardous materials. The asbestos course was required to be taken by team members annually, and these yearly courses were also arranged and paid for by Respondent.

During the course of their employment, members of the Hazmat team signed numerous forms and documents that were used to document the work of removing hazardous materials. These forms include Mop's (Method of Procedure), Telephone Equipment Orders (TEO's), 5099 Forms and manifests. On all of these forms, Hazmat team members signed these forms as representatives of Respondent or its predecessor companies.

Respondent's Waste Management Plan dated July 1, 1993, was provided only to Respondent's employees, which includes the Hazmat team. In fact, the document specifically states that "Generator[7] responsibilities cannot be delegated to non-NYNEX Company or to a contractor. TRG . . . may be able to accept generator status if requested." Further, the bottom of the document states "Not for use or disclosure outside of NYNEX Corporation or any of its subsidiaries except under written agreement."

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[5] However, at the time of changeover to Win-Pay from Butler, Warren informed the employees that since they would not be receiving paid vacation from Win-Pay, the employees would be given the option of accumulating overtime hours, and using these hours for paid vacation.

[6] George was also suspended along with a group of other workers in 1990, for one week, by Bill Warren. Also, George had his salary reduced for two weeks, because of a problem with procedures he wasn't following, by another official of Respondent, Mary Whiting.

[7] Generator is defined as any person or site whose act produces a hazardous waste.

The MOP forms are generally accompanied by a contact list,[8] which is made available to Respondent's employees at the site where the work is performed, and is often posted at these sites. These contact sites provide names, job titles, and phone numbers of various employee and representatives of Respondent, including at various times Warren, Whiting, Powell, Dave Barnes, and McIntosh.

These contact lists also included members of the Hazmat team including Quildon, with their telephone and pager numbers set forth. These lists refer to the Hazmat team as Field Representatives and Technicians. Warren is designated as Field Supervisor, or Manager of Field Operations.

Furthermore, Respondent has submitted various documents to State Agencies, which indicate that Hazmat employees are employees of Respondent. Thus the requests for amendments dealing with Respondent's license to deal with radioactive materials, incorporates by reference Respondent's "Radiation Training Manual" dated December 2, 1986. This manual states inter alia, "NYNEX Enterprises employees will perform small quantity low level radioactive tube removal, packaging and transportation." Additionally, attached to the amendments filed by Respondent, includes an organizational chart of Respondent's employees revolved in handling radioactive materials. On the bottom of the chart, which lists the hierarchy of TRG for these functions, is listed "Field Technicians and Engineer. There is no dispute that members of the Hazmat team were classified as Field Technicians.

Additionally, the record contains an E-Mail sent by McIntosh to Manager. Joe Mauro dated October 27, 1999. In describing the current situation of the Hazmat team, McIntosh wrote, "we supervise, monitor their performance and give them yearly raises. Accordingly. there is no hourly rates set by a contract via an agency for those contractors." Finally, McIntosh sent a memo to all members of the Hazmat team dealing with Comp Time on June 14, 1999. After indicating to the team that all Comp time accumulated must be used by certain dates, McIntosh continued, "we value all of our staff members, but we must warn you formally, due to the Company procedures associated with Estimates all Comp Time must be used to comply with the policy of the Accounting Department."

The job titles of the Hazmat team included Field Representatives, Field Supervisors and Technicians. Bert Quilden was a Field Representative, and also had the title of assessment manager. Thus title however referred to his responsibilities as an "appraiser" in assessing the value of the frames. He was also more or less of a leadman, as the most senior employee, who acted as a liaison between between management and the rest of the team, and would relay the instructions and orders from Warren to there members of the team.

The Field Representatives were the highest paid employees, who generally did not perform the actual removal work. They had quasi-supervisor and administrative roles. They would get the technicians started; show them the material to be purged and provide them with equipment. They also were responsible for the preparation of paperwork, attended MOP meetings and surveyed future jobs. Each field representative was responsible for a particular geographic territory.

The actual removal of hazardous materials was performed by field technicians. They are assigned generally to two person teams, and remove the hazardous material from frames and pack up the materials in boxes for disposal by outside contractors.

[8] The documents are entitled NYNEX or TRG "Integrated Technical Services Contact List."

Field Supervisors perform the same functions as technicians, but receive a slightly higher salary because they also prepare weekly work logs. Generally, one supervisor is assigned to one two-person teams.

The Hazmat team also included at one point Valerie Powell, who was also paid by Win-Pay, but who performed administrative work including payroll information. Powell who was also employed at one point as a field representative on the Hazmat team, was promoted to fill Bill Warren's position, on June 21, 1999, when she was transferred to Respondent's payroll. After her promotion she was not replaced as a member of the Hazmat team, because the volume of work had decreased. Thus, Powell continued to perform the administrative functions, including payroll after her promotion and transfer to Respondent's payroll. At around that time, Quildon retired, and was replaced by Michael George.

The members of the Hazmat team did not wear asbestos abatement gear, but they did wear gloves and dust masks, ring badges and a film badge which measured any exposure to radiation from the radioactive tubes.

The members of the team wore identification badges while working on Respondent's property. Prior to the merger of NYNEX and Bell Atlantic in 1998, the badges said "No emp" in large letters on the badge. However, several of the members placed fellow stickers over the words "No Emp" on the badge, because they were getting pressure from people saying " you're not Union, we shouldn't let you into the building."

After the merger, the team was issued new badges. These badges did not specify employee status; but they were a different color than the badges issued to other of Respondent's employees, and included an expiration date, while badges worn by other employees of Respondent did not.

When the Hazmat team received special ID badges to enter the WTC, they were red with a large white "U" on them. The badges issued to other of Respondent's employees were green, and did not include a large "U" on it.

The team became known throughout the Company as the Bell Atlantic Hazmat team. They were recognized as specialists in the removal of radioactive tubes, and mercury relays, PCB oil, asbestos washers and line card resistors from retired central office equipment. This was a unique function which required special knowledge in handling and disposing of hazardous materials.

The type of hazardous material removed from frames by the team changed over the years, as more material became classified as hazardous. Some of the items removed included bromide tubes, krypton tubes, asbestos washers, PCB oil, circuit packs, mercury relays, and line card resistors. These items would be removed and placed into special boxes or drums for safe packing. The boxes would be transported primarily by outside contractors to a place of disposal.

To remove the materials described above, the team members used various tools and equipment such as air chisels, power chisels, air guns, drills, pliers, screw drivers, and cable cutters.

The process for purging the hazardous material, begins with a survey by an engineer and a decision that frames need to be retired. The Engineer would notify Bill Warren that there was hazardous material that needed to be removed. Warren would then send a field

representative to estimate the cost of purging the hazardous materials. Warren would then provide the information to the engineer, who would then determine whether the cost of the removal justified the project.

If the project was approved, and MOP would be conducted, chaired by a member of the Hazmat team. Attendees included an engineer, as well as shop stewards from the CWA. The participants would discuss the work to be done, the method of removal, how long it was going to take, who was going to do the removal, and what precautions would be taken.

At several MOP meetings chaired by Powell, CWA shop stewards asked who was doing the work, and Powell would reply "TRG contractors." According to Powell the steward would ask who the contractor was and she would reply Win-Pay. Frequently the union representative would complain that the Union would rather have union-represented employees doing the work, and at times would even threaten not to allow the work to be done.

When George attended or chaired MOP's as a representative of the Hazmat team, he recalls that when the union stewards asked by whom the people doing the work were employed, the response would be that the "Bell Atlantic Hazmat team" was doing the work.

As noted above, their MOP forms make no reference to Win-Pay on any other contractor, and the Hazmat team members signed the MOP on behalf of Bell Atlantic.

The Hazmat team was also responsible for the removal of dead batteries and hazardous chemicals. However, in these situations, the Hazmat would not perform the actual removal, but would oversee the removal which was performed by an outside vendor. This function was performed by field representatives, who was specially trained to ensure that the vendor removing the batteries or chemicals had the proper forms, and removed the items safely. They were also trained in emergency procedures in case of a battery spill. After the removal was completed, the field representative would document that the removal had been done properly by the vendor.

In performing their duties, the Hazmat team worked in over 100 central offices throughout New York State. The team sometimes spent a month or two in each office depending on the size of the job. At times, the team would be working on a floor where no other employees of Respondent would be working. On occasion, they would purge hazardous material from abandoned buildings.

Frequently the team would work in the vicinity of CWA represented employees of Respondent. The job titles of these employees include, COT's, Material Equipment and system technicians and power technicians.

COT's are responsible for dealing with troubles in telephone equipment in central offices, including the frames that are worked on by the Hazmat tam. The COT's salvages (removes) usable equipment from the frame, when it is decided that a frame is obsolete. Among the items that are removed by COT's from frames, is circuit pecks which sometimes[9] contain mercury relays which are classified as hazardous material. When a circuit pack is defective, the COT removes it, replaces it with new circuit pack and sends the old one to a centralized area to be packed in bulk and returned to the manufacturer.

[9] Not all circuit packs contain mercury relays.

However, their COT's do not purge the mercury relays from the circuit pack, which is done by the Hazmat team.

Some COT's as related above did perform "rip outs" during a three year period in the 1990's, pursuant to a agreement between Respondent and the Union. In so doing, in some of these cases, the rip out included the removal of hazardous materials as well.

On one occasion, Michael George observed COT's removing radioactive tubes. He told the COT's that they were not supposed to be doing that work, because the material was hazardous. At that time the COT's stopped performing that work.

Before a job begins, the field representative of the Hazmat team would often meet with a COT to inform them where the team would be working. The Hazmat team would cordon off their work area, put up a plastic barrier and or put up tape to make sure that no other employees come through the area where the Hazmat team was working.

At times, a fuse might blow while the field technician is working on the frame. He would then call over a COT to handle the problem. Similarly, if it became necessary to power down the frame, the field technician would speak with the COT, who would either power down the frame himself, or call a power technician to handle the situation.

There were times when the Field Technician would be working on the same frame as the COT, but this was a rare occurrence.

Power Technician's which are covered by the same plant contract as the COT's, are responsible for handling power on the frames. There were times when a field technician would cut a wire not powered down, and an alarm would go off. The power technician would be called to fix the problem.

Power technicians are also present along with field representatives from the Hazmat team, the entire time that the outside vendor is performing the removal of batteries.

Material Equipment Technicians, who are covered by the TRG contract, spend 95% of their time working on frames, either adding, removing or modifying equipment. They were generally responsible for fixing equipment on line and working frames, not for purging hazardous material from retired frames. They would remove equipment which contains hazardous material to reuse that equipment on another frame or place it in storage.

The material equipment technician used some of the same equipment as the Hazmat team, such as power chisels, drills, wrenches and screwdrivers.

It is undisputed that neither the Material Equipment Technician, COT or Power Technician receive any training in the handling of hazardous materials, and do not as a regular part of their job handle or remove hazardous materials from frames.

C. The CWA Finds Out About The Hazmat team

In later 1999, Frank Mancini, the Bus Agent for Local 108, observed some members of the Hazmat team, whom he didn't know, removing equipment in Bay Shore, Long Island. They were wearing Bell Atlantic badges, which did not mention nonemp. The badges were a different color than the badges worn by other employees of Respondent. However, since it did state Bell Atlantic on it, and did not say "nonemp", which is generally used on badges worn by contractors,

Mancini believed that they were employees of Respondent. Mancini asked where they came from, and they responded 140 West Street. After some initial hesitation, the employees told Mancini that they worked out of West Street, performing removal of hazardous material for 7-9 years under the supervision of NYNEX bosses, but were paid by Win-Pay. Mancini informed the employees that since they were doing this work for many years and work for Respondent's supervisors, they should be union members and be receiving benefits.

According to Mancini, this was the first knowledge that he had of the existence of the Hazmat team. He contacted Angel Feliciano, Vice-President of Local 1101, which covers Manhattan. Feliciano informed Mancini that he had no knowledge of the Hazmat team, and told Mancini that he would find out what he can and get back to Mancini. Feliciano subsequently got back to Mancini, and reported that he could not find out anything about the employees.

At that point Mancini discussed the matter with George Welker, the President of Local 1108. Mancini reported that there was a group of nine employees who do rip outs of the frame of hazardous material at central offices and were paid by Win-Pay. Mancini indicated that he would like to try to organize these employees. Welker agreed.

Thus in early 2000, Mancini met with the members of the Hazmat team at a central office on 34th Street, in Manhattan. As a result of this meeting, 9 members of the Hazmat signed cards, on various dates between February 15, 2000 and March 13, 2000. The cards of employees Garfield Assevero, Alvin Smith, and Abimbola Lana, stated that they were employees of "Bell Atlantic – Paid through Winston-Win Pay." These employees listed their job title as "environmental specialist", with Assevero and Lana adding supervisor to their title.

Michael George listed his employer as "Win-Pay", and his job title as field representative in the Environmental Engineering Department.

Wayne Sebro, Tito Knight, James Anthony, James Pando and Richard Casiano left blank, the portion of their cards listing the employer. Sebro listed his title as field supervisor in the Environmental Department. Knight's card listed his job title as field technician, also in the environmental department. Anthony's card listed his job title as hazardous material handler, Pando and Casiano as environmental technicians.

According to Welker and Mancini, after obtaining the cards, they discussed the matter with Carmine Turchi, an International representative, and they concluded that the team was performing bargaining unit work and they should be represented by the Union. They decided that the employees should be under the TRG contract, since they do work that is "not customer related" and that TRG basically replaced Western Electric who used to perform the work involved. They also concluded that the team should be classified as "material technician", since the work of these employees is "close enough" to hazardous material removal.

They did not discuss filing a grievance. Mancini testified that he did not believe a grievance was appropriate, because the Union could not "file a grievance for somebody who's not covered under my contract who's not an employee."

Therefore they concluded, after consultation with the Union's attorney, that Local 1108 would file charges with the Board. Thus on March 13, 2000 the Union filed a charge in Case No. 2-CA-32858, alleging that Respondent has violated Section 8(a)(1) and (5) of the Act, by

failing and refusing to extend the collective bargaining agreement[10] to workers who remove equipment from Respondent's facilities. The charge added that Respondent and Winston Staffing are a single employer or joint employers.

Shortly after the charge was filed, Welker received a call from Jeff Weiner, Respondent's Executive Director of Labor Relations. Weiner began the conversation by chastising Welker for not giving him "a heads up", the next time the Union files a charge. Weiner then asked Welker, "what are you looking for?" Welker replied, "bring them into the contract. We feel they are employees." Welker did not mention which contract he believes should cover the employees. Nor did Weiner ask for a clarification. Weiner told Welker that he would have to speak to David Rosenzweig, Respondent's Regional President for Network Services.

Welker testified that he would rather see the employees under the TRG contract as material technicians, since the material technicians install equipment in the central offices. He added however that he would have no problem covering the employees under the plant contract.

Similarly, Mancini testified that material technicians install equipment on frames in the central offices. He added generally that they do not ripout old obsolete equipment from frames. Mancini adds that in his opinion, although the Hazmat team should be under the TRG contract, he would take the employees under the plant contract as well.

Mancini also admitted that the material technicians do not have "similar skills sets" as the members of the Hazmat team.

Pursuant to Weiner's suggestion, Welker then called Rosenzweig. Welker informed Rosenzweig that "this is a courtesy call." He added that Respondent has non-union people, employed by Winston doing rip outs in central offices. Further, Welker explained that he felt that these employees should be part of the CWA contract. Welker did not specify which contract he believed should cover the employees.

Welker also informed Rosenzweig that the laborers Union might be picketing or putting up a lot in front of the central offices, because the laborer's feel that it's their work.[11] Rosenzweig replied, "I'll look into it." Welker never heard back from Rosenzweig. It does not appear that the laborers Union ever picketed, as Welker had suggested. In that regard, Welker testified that he had heard from someone that the laborer's Union intended to picket, but he did not recall who had informed him about that possibility.

The record reveals that the CWA is vigilant concerning non-employees, i.e. contractors performing work in central offices. Respondent receives frequent calls from CWA representatives complaining about contractors performing unit work, or people working without an ID badge.

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[10] The charge did not specify which collective bargaining agreement the workers should have been covered by.

[11] There is no record evidence that the laborer's union represents any of Respondent's employees. However, a document issued by the Building and Construction Trades Department, AFL-CIO reflects that the Laborers International Union represents laborers who perform "asbestos removal, hazardous waste and radiation clean up."

It is also admitted by officials of the CWA that their shop stewards are instructed to look out for contractors doing unit work, and to report such observations, either to file grievances or to attempt to organize the employees of the contractors.

At times the union has filed grievances over the contracting out of "rip out work". In other instances, the Union has both sought arbitration and filed charges with the Board.

For example, in 1999, the CWA filed a grievance over Respondent's decision to subcontract certain work, i.e. garage maintenance work, to Butler [12] The case was eventually sent to arbitration. The arbitrator issued his award in October of 2000. He dismissed the Union's grievance, finding that the subcontracting to Butler was not violative of the contract. The Union had also contended at the arbitration that Respondent exercised such a degree of control over the discipline of Butler's employees that the employees are in fact employees of Respondent. The arbitrator concluded that the evidence did not support this contention, and that Respondent's involvement in personnel decisions was necessary to protect its legal obligations as owner of the trucks and provider of the services that are carried out with these trucks.

Subsequently, in February of 2002, the CWA filed ULP charges with the Board, alleging that Respondent violated Section 8(a)(1) and (5) of the Act by refusing to extend the collective bargaining agreement to employees who repair and maintain Respondent's trucks, and who were paid by Butler and two other companies.

In a covering letter sent with these charges, written by an attorney for the CWA, it is asserted that the employees receive paychecks from the payroll companies, but work at Respondent's equipment, performing work covered by the plant contract with the CWA. The letter adds that the facts are similar to the facts in the instant case, in which the Region had just issued a complaint.

These charges were withdrawn by the CWA, after being informed by the Region, that otherwise they would be dismissed based on Section 10(b).

In 2001, the CWA filed charges with the Board, alleging that employees of an entity called Lexus were really employees of Respondent and should be covered by a contract with the CWA. These charges were withdrawn, in threat of dismissal based on lack of evidence. Thereafter, the Union took to arbitrator a grievance concerning that same dispute and the parties have selected an arbitration.

During the investigation of the instant charge, Respondent's attorney sent a letter to the Region, expressing a willingness to proceed to arbitration over the issues involved in this proceeding, and agreed to waive all procedural time limits. The Union has not filed a grievance over the issues covered by the instant complaint.

D. The Layoffs and Terminations of the Hazmat team

As noted above, when the Hazmat team was formed in 1989, the employees initially believed that they were being hired as employees of Respondent. However, shortly after being hired by Respondent's officials, they were informed that they were to be paid by Butler, and

[12] I note that Butler was the predecessor contractor to Win-Pay with respect to the Hazmat employees.

were considered employees of Butler.

Various employees including George complained about this situation to Bill Warren, and told him that they wanted to become phone company employees and get into the Union. Initially Warren replied that Butler was not part of the phone company, and the job was not a union position, because it was only going to be a temporary project of a year to a year and a half.

After the year and a half went by and the job continued, the employees discussed the issue among themselves and with Warren at meetings. The employees would continuously ask Warren to become NYNEX employees and to get into the Union. Warren would reply that he didn't have the authority to do it, but he was working on it , and would tell him to hold on and be patient. He at times would tell the employees that he was trying to get them into the Union, but some higher officials in the Company were not going along. At one point in 1994, when employees again brought up the issue of becoming employees of Respondent and getting into the Union, Warren replied that Hal Hepensteil (an official of Respondent higher than Warren in Respondent's hierarchy), "is not going to fight for you, because Hal doesn't care."

On one of two other occasions the employees mentioned the issues to Mary Whiting in the early nineties, but the record doesn't reflect her response.

In January of 1998, upon the merger of Bell Atlantic and NYNEX, the Hazmat function was transferred from TRG to Cecil McIntosh in the Engineering Department of Verizon, New York.

When the employees were introduced to McIntosh, and informed by Warren that McIntosh would be their new boss, Warren added that McIntosh "will make sure that all of you get into the company." McIntosh laughed, and stated that he will have to talk with his other bosses about it and "hear what they were coming up with."

Shortly thereafter, George and McIntosh had a conversation in the car, while driving from West Street to the MRC. George told McIntosh that the employees wanted to become permanent employees and wanted to be in the Union. McIntosh replied that he would see what he could do. He told George that it is easier to bring employees in as a manager, but he would speak to his bosses and try to get the employees in the Union. McIntosh added that he couldn't make any promises but he would try to get the employees into the Union a few at a time. He asked George to obtain resumes from all the employees, and he would speak to his bosses and see what he could do.

Subsequently, the Hazmat team submitted resumes to McIntosh, and thereafter the employees would ask McIntosh regularly about the issue at their weekly meetings. They would specifically ask about becoming phone company employees and getting into the Union. McIntosh would respond that he was working on it and would try to get the employees in one or two at a time. On one occasion, McIntosh informed the employees that he had talked to his bosses and it looked like all of them would be able to transfer into the company, "but not everybody at once, it will be like one at a time."

These conversations with McIntosh continued until the end of 1999. However, the employees never became employees of Respondent, nor were they put into the Union.[13]

[13] My findings with respect to the conversations among employees, and between employees and officials of Respondent concerning becoming employees of Respondent, and getting into

Continued

The record contains two E-Mails which reflect discussions by management regarding the Hazmat team and the possibility of changing the current status to a system of using more traditional outside contractors to perform the work.

On October 27, 1999, McIntosh sent an E-Mail to Joseph Mauro, his boss. The E-Mail reads as follows:

> To: Joseph Mauro (a) NYNEX
> From: Cecil McIntosh
> Date: October 27, 1999 09:18:59 a.m.
> Subject: Re: Co-Employment Issue
>
> Burt Quildon, was contacted by TRG in 1987, a few years later, he was given the 401K option (He was the only individual given the 401K option). He left the company on October 8, 1999. From what I learnt, the 16 contractors (we are down to 12 contractors to date) were recruited by TRG, thereafter their payrolls were transferred to Butler Agency which is now known as Win-Pay, Inc.
>
> We are still providing training, however, there are concerns as discussed with the Environmental Compliance and Sourcing as to whether Bell Atlantic should be providing training for the contractors or should it be done by their Agency?
>
> The old TRG process which is still in-place is that we supervise, monitor their performance and give them yearly raises accordingly (there is no hourly rates set by a contract via an agency for these contractors).
>
> Last June the contractors requested a meeting with me to discuss their concerns, such as Overtime, hourly rates, daily tour, yearly physical and benefits. I met with them as requested. I did a follow-up on their yearly physical; whereof I learn that TRG discontinued it four years ago. I spoke with Williams D'Eletto, Manager – Environment Compliance on the yearly physical. He agreed they should have it, however, it should be coordinated by their Agency. I spoke with Ray McCourt, Win-Pay, Inc. to coordinate the contractor's yearly physical. I was told he would have to get their Attorney's advise, thus he will get back to me, to date, I am still awaiting a reply.
> Of late, the contractors are disgruntled, they think that they should be receiving benefits like any other Bell Atlantic workers because they were contracted by TRG, and not through an Agency, only that their checks are issued by the Agency.

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the Union, is based on the mutually corroborative and credible testimony of George and Assevero. McIntosh admitted that he did speak to both George and Hazmat employees as a group about becoming employees of Respondent, but that the employees all requested to be managers, because they did not want a pay cut. I do not credit McIntosh's testimony in this regard, since it is inconsistent with the credible testimony of George and Assevero as well consistent with his own E-Mails as described below. I also credit George's rebuttal testimony that he asked McIntosh about becoming a manager only as a promotion after the retirements of Warren and Warren's replacement.

> Based on the above concerns, Sourcing, Compliance and I reflected on the issues and determined that, based on the present structure of these contractor, it would not be in the best interest of Bell Atlantic to continue under the present system of supervision.
>
> Legal is reviewing our concerns and proposals. Based on their advise will determine what method we use for the supervision of Hazardous Waste Removal.
>
> **Summary**
>
> The only function that would change is the workers will be under the supervision of an approved vendor for Hazardous Waste Removal. All other functions and responsibilities will remain the same.
>
> Example, the Asbestos Removal undertaking is under the Real Estate Department; they used an approved vendor to do the removal, and management personnel to coordinate the removals and documents. This is the same process I am trying to put in place for the Central Office hazardous waste removal.

Further on November 5, 1999, an E-Mail was prepared by Alvaro Mora, another official of Respondent, summarizing a meeting attended by a number of representatives of Respondent, including Powell and McIntosh. The E-Mail discussed a walkthrough with the Project Engineer wherein issues were discussed concerning the use of outside vendors to perform the purging of hazardous materials. The results of the meeting was summed up as follows:

> **Results**
>
> Since the driver for this project is the temporary labor force currently performing the work and the potential for exposure to co-employment lawsuits the RFI, RFP and SOW documents will be changed to focus on replacing the current payroll agency provided labor team with an independent contractor. The modified documents will be distributed to the team, and in the absence of any requests for modifications the team will approach David Feldman for review and comment.

Another meeting held by Powell, McIntosh and D'Eletto on October 14, 1999 was also summarized in an E-Mail. This document reflects that the attendees, "discussed current operations of Hazmat Removal group in New York State and some of the concerns brought about by the length of service as Temps, (5 to 12 years) and the temp agency reaction to the issue of training and yearly physicals."

The E-Mail goes on to observe that the team "decided to explore outsourcing the groups tasks as well as its supervision." Different scenarios for the outsourcing to contractors was set forth. The E-Mail concluded with various steps to be taken in furtherance of the tentative decision, including "investigate legal ramifications of current operations."

Furthermore, Respondent's own witness, Valerie Powell was asked whether Respondent's concerns about lawsuits alleging co-employment status of the Hazmat team motivated its decision to get rid of the team. Initially she responded no, but after being

confronted by the E-Mail described above, Powell admitted that "it was a reason, but it wasn't the main reason."

Additionally, both McIntosh and Powell admit being aware of the "Microsoft Issue", which related to litigation in the news in which Microsoft was found to be a co-employer, and that they were concerned that Respondent might be faced with co-employer issues with respect to the Hazmat team.

Between May 8 and May 19, 2000, all nine downstate members of the Hazmat team were laid off.[14]

The team members were notified by Powell that there was no work available for them. When McCourt noticed that the timesheets were not coming in, McCourt called Powell to make sure that Win-Pay was not missing any timesheets. Thereafter in late May, he met with Powell and McIntosh at 140 West Street. McIntosh and Powell informed McCourt that the team was laid off, and Win-Pay's relationship with Respondent could be ending, because Respondent was seeking another company that handles hazardous materials removal, and that Win-Pay would be phased out as pay rolling agent. McIntosh did not inform McCourt precisely when the phasing out would occur.

George credibly testified that when he was notified of his layoff, in mid May, he was working at a jobsite in Hempstead, Long Island, where there was at least a month's worth of work for the team ready to be performed, without any need to wait for power problems to be resolved.[15]

The Hazmat team was recalled to work on June 17, 2000. The recall was effectuated by Respondent notifying Win-Pay in writing that Respondent had work for the nine downstate members of the Hazmat team, as of that date. The letter makes no reference to the three members of the team that were stationed upstate, suggesting that these three employees were not laid off in the first place, although as noted above, the record is not clear on this point.

McCourt attempted to contact all members of the team by phone, to notify them to return to work. However, he was not sure that he was able to speak to all the team members. All employees with the exception of Sebro returned to work. Sebro testified that he accepted another job, but the record does not disclose whether or not Sebro was contacted by McCourt or was otherwise informed of the offer to return to work as a member of the Hazmat team. The team continued to work through the end of 2000, except for a three week period in August of 2000 when there was a work stoppage by the Union.

In October of 2000, Russ Barrow, an admitted supervisor and agent of Respondent appeared at a jobsite at 811 Tenth Avenue. He asked the members the Hazmat team to sign a

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[14] The downstate employees were Garfield Assevero, Abimbola Lana, Michael George, James Anthony, Wayne Sebro, James Pando, Tito Knight, Alvin Smith, and Richard Casiano. The Hazmat team also included three other employees who were stationed in upstate New York. The record is unclear as to whether these employees were also laid off in May of 2000. These employees were not included in the charges or amended charges, and the complaint makes no allegation as to them, either for the layoffs in May of 2000 or the terminations in December of 2000.

[15] George was working along with two other members of the Hazmat team at Hempstead, James Anthony and Richard Casiano.

document stating that they are employees of Win-Pay. The team declined the invitation. At around the same time, Ray McCourt attempted to assign Hazmat employees to a work location [16] The employees refused to follow this direction, asserting to McCourt that they were employees of Respondent and had never been assigned to work locations by Win-Pay in the past.

Powell and McIntosh were Respondent's primary witnesses with respect to the decision to layoff the Hazmat team in May of 2000. They both insist that the only reason for the layoff was that there was simply no work for the employees at that time. They also both testified that they were not aware of the Union's National Labor Relations Board charges until the summer of 2000, when Respondent's attorneys came to the office to look at some documents. Further these witnesses assert that the layoffs had no relating to ongoing efforts of Respondent to assign the work of the Hazmat team to an outside vendor.

Powell testified that she recommended to McIntosh, based on her review of the work availability for the team, that the team be laid off for lack of work. She also provided specific testimony concerning the particular jobs that the employees were working on immediately prior to their layoffs.[17]

Powell testified that George, Assevero, and Lana were working at 811 Tenth Avenue when they were laid off, because "union problems" shut the job down. Powell claimed that the CWA refused to permit the Hazmat team to work at that location, and threatened a strike over their presence. She further testified that she received a call from Lisa Birkdale, Respondent's attorney, on the day of the layoff, who told Powell that workers should be brought back to work, and that the employees were brought back as a result, although apparently not for some time. She then reversed herself and testified that the employees laid off from Tenth Avenue were recalled promptly after the call from Birkdale, sat in the office for a few days, and then were laid off again for a couple of weeks. Powell then testified that she sent the employees back to Tenth Avenue despite the union problems, and then stated that there had been a temporary resolution of the union problems. Curiously, she added that the problems were still not resolved by the time of the instant trial.

In fact, other evidence, including Respondent's own records and testimony from McIntosh, establish that Powell's testimony about Tenth Avenue jobsite was not correct.

Testimony of George and McIntosh, as well as the MOP for that job, established that it did not begin until July 7, 2000, after the employees returned to work. Further the "union problems" on that job did not occur until December of 2000 and early 2001, when the CWA filed a grievance about Hazmat team working at that location.

Powell also testified that Anthony and George were working at a jobsite in Hempstead, Long Island,[18] but they were sitting around not working, prompting a customer to complain that the Hazmat removal was behind schedule. Powell explained that the frames had not been

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[16] According to McCourt he attempted to make this assignment , after being told to do so by Respondent. This was the first and last time that he ever made or attempted to make a work assignment to members of the team.

[17] Her testimony was that the layoffs were staggered beginning on May 8, 2000 based on the facts that there was no longer available work at the jobs involved, for each team.

[18] Note that this testimony contradicts her earlier testimony that George was employed at Tenth Avenue, at the time of the layoff.

powered down, and she was unable to obtain an estimate from the engineer as to when the frames would be powered down. Powell added that the frames were not powered down for two to four weeks.[19]

Powell testified further that here was a team working on small projects, and when these projects were completed, these workers were laid off as well.

Finally, according to Powell the last team laid off, were working at night at 38th Street. She asserted that when that job was completed on May 19, 2000, this group was laid off. However, at another point in her testimony, Powell admitted that "maybe" there was another floor to be done at that location, but quickly changed that testimony to state that the request to remove hazardous material from that site had come in, during the week and a half that this crew was laid off.

McIntosh also furnished testimony concerning the decision to recall the Hazmat team on June 19, 2000. According to McIntosh he (not Powell) received a call from attorney Birkdale[20] who suggested to McIntosh that "it would be nice" if the Hazmat team was working. Based solely on that conversation, McIntosh asserts that he ordered Powell to recall all of the Hazmat employees to work even though there was still no work for them to perform. In fact, according to Powell, and McIntosh, there was still no work for the employees when they were recalled, and the employees sat in the office lounge for a week until work was found for them on June 27, 2000.

At around that time, Respondent changed the procedures required for removing line resistors, which is the major component of the work of the Hazmat team. Rather than remove each card individually, under the new process, the team removed the plate upon which he cards were attached. This new process substantially reduced the number of line card resistors that could be removed from 3000 per day to 500 per day.

Respondent introduced documentary evidence which reflected the number of items purged by the Hazmat team from 1998 through the end of 2001. The number of line card resistors removed by the team was reduced by 44%, (297,870 to 166,496) in 2000, as opposed to 1999. Similarly the number of mercury relays purged dropped from 27,605 to 6, 775 during these periods.

The records also disclose that the total number of pieces purged in 1998 was 262,897.

However, these records do not show any prior year comparisons do reflect the work available in May of 2000, when the layoffs were effectuated. The records not in any way demonstrate what work was available to be performed as of May of 2000, but only show as noted the actual amount of pieces purged during the month of May. Thus for example these records do not refute the credited testimony of George, that at Hempstead, where he was

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[19] As noted I have credited George's testimony that there was at least a month's worth of work available on frames that were powered down at the time of the layoff.

[20] According to McIntosh Birkdale in this conversation asked McIntosh to gather some records in response to a subpoena. He then alleges that he informed Birkdale that the employees were temporarily laid off. At that point, she allegedly responded "it would be nice if they were back to work." McIntosh asserts that Birkdale did not mention the charges filed at that time, and he was not aware of the charges until the fall when different attorneys so informed him.

working on the date of his layoff with two other team members, that there was at least a month of work remaining for the team on frames without power problems.

In 1991, Michael George testified that he was laid off for about two months due to a slowing of the process of powering down central offices to be purged.[21]

Further the record reflects that some time in 1999, Respondent, based on recommendations from Powell, eliminated three positions from the Hazmat team, due to a shortage of work.

McIntosh furnished extensive testimony with regard to the decision to terminate the Hazmat team (or as Respondent asserts, notify Win-Pay that it no longer desires the service of the Hazmat team). According to McIntosh, as soon as the Hazmat team came under his supervision, in early 1998, he began to believe that the level of future work for the team would not support maintaining the Hazmat team,[22] and that a hazardous material vendor with other customers would be more appropriate to perform this function. He presented this suggestion to his supervisor and was instructed to seek approval from the Environmental Department and Corporate Sourcing.

While McIntosh admits that he was not happy with the then current procedure of Respondent deciding on raises for what he believed were contractors employees, he denies that this concern played any role in his plan to use a professional vendor.

McIntosh then contacted Al Mora in Corporate Sourcing, and allegedly informed Mora of his plan. He admits telling Mora that he was concerned about how the team was being paid, but contends that his "major issue", was changing the function to a bid process because he believed that in the future, work would not support a team working full time.[23] Mora replied that he would look into the issue, but according to McIntosh, Mora did not do so immediately, and required McIntosh to make several calls to him about the matter.

McIntosh contends that more serous consideration of his plan did not occur until the fall of 1999. At that time McIntosh, Mora, D'Eletto and Powell and others had several discussions about various alternatives to the current system, some of which were documented in the E-Mails referred to above, as well as other E-Mails and memos introduced into the record. One option discussed was having a hazardous material removal vendor employ the current Hazmat team. However, according to McIntosh the group concluded that no vendor would agree to do so because of the team's rate of pay, and that Respondent could not force a vendor to employ these workers.[24]

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[21] The record does not reflect how many other members of the Hazmat team were laid off in 1991 along with George. In this regard Powell testified that more than one member was laid off, but she did testify whether or not if the entire team was laid off.

[22] At that time the Hazmat team consisted of 16 members.

[23] McIntosh adds that since 1998, there has been a gradual reduction of work for the team.

[24] I note that none of the documents introduced confirm McIntosh's testimony that management decided that it could not force a vendor to employ the team or that it concluded that no vendor would agree to do so because of the pay scale of the employees. In fact, the October 27, 1999 E-Mail stated that the conclusion was that the "only function that would change is the workers would be under the supervision of an approved vendor for Hazardous Wast Removal. All other functions and responsibilities will remain the same."

In this regard, the evidence reveals that Powell recommended to McIntosh that even if Respondent uses an outside contractor as planned, it would be a good idea to try to persuade the contractor to hire at least one or two members of the Hazmat team, because of their extensive experience in dealing with hazardous materials in Respondent's central offices.

McIntosh and Powell both concede that in these various meetings, concerns were expressed about the length of service of the Hazmat team as temps, as well as the "Microsoft Issue" and the possibility that Respondent would be faced with co-employer issues. However, McIntosh denied that any of these concerns motivated Respondent's decision to use an outside vendor.

As a result of these management meetings and discussions, an RFP was issued in December of 1999 to prospective hazardous material removal vendors. On December 21, 1999 a walk-through central office occurred with these prospective vendors, along with various officials of Respondent. One of the vendors believed that asbestos statement procedures, were required for the purging of asbestos washers. This problem caused a delay in the approval process, since Respondent feared that an abatement procedure would not be tolerated by the CWA and might cause a walk-out.

At around the same time, the landfill where Respondent had been disposing of line card resistors began complaining about the amount of metal being disposed of with the asbestos. Due this problem, as well as concerns relating to asbestos abatement, Bill D'Eletto of the Environmental Engineering Department began exploring other ways of handling asbestos on the frames. This investigation caused the delay in implementing McIntosh's plan to use a hazardous material vendor.

D'Eletto recalled from his prior employment the existence of a blast furnace, which could separate the metals from the asbestos in a safe and proper manner. However, for environmental reasons, D'Eletto could not locate such a furnace in the United States and concluded that none of the vendors in the United States was appropriate.

However, he learned that a vendor operating in China had such a furnace. After a series of communications with facilities in China, and a period of time to obtain approval to travel there, D'Eletto visited two facilities in China, which would remove equipment from the frames and two other Chinese facilities, which would place the resisters in a blast furnace. Those furnaces allowed recovery of metals from the cards while turning asbestos into slag.

In the fall of 2000, Respondent determined that the process was safe, and a final decision was made to use hazardous removal vendors on a bid system and to contract with two companies in China – Fortune Metals and Leh Ta Enterprises to ship and dispose of the frames with the line cards attached.

Once Respondent signed the contracts with the new vendors, Respondent in December of 2000 notified Win-Pay, effective January 2, 2001 that it no longer needed the Hazmat team, in New York State, The notification dated December 15, 2000 mentioned 11 names, including Sebro, and the members of the team stationed upstate. The memo also asked that Win-Pay collect Verizon badges from these individuals.[25]

[25] The list included the eight discriminates, plus Birmingham, McConnell and Candido, who worked upstate. George's name was not on the list. The record doesn't disclose whether this was an oversight, or that George had already given in his pass. In any event there is no dispute

Continued

In January of 2001, Respondent began using the new process. Four outside vendors began removing hazardous materials, except for line card resistors, from the frames. The vendors are paid on a job-by-job basis. The frames, with the line cards still attached, were then shipped to China. This new practice of using blast furnaces in China applied to New England and Verizon South, not just New York. The new process did save money for Respondent, since it reduced the amount of hazardous material to be purged.

Respondent did not request or demand that any of the four vendors performing the purging of hazardous material, hire any of the members of the Hazmat team, even though Powell had recommended to McIntosh that it would be a good idea to have at least some of team continuing to do the work.

McIntosh asserted that it was decided by him and other members of management that the vendors would not agree to hire any of them, since their salaries were too high,[26] and that in any event Respondent had no power to force or compel the vendors to hire anyone.

McIntosh also admitted that when the decision was made to use outside vendors that no cost comparison was made between Respondent's cost of paying the vendors, versus the close of continuing to use the Hazmat team under the current arrangement with Win-Pay. According to McIntosh, the sole reason for Respondent's decision was his belief that there would not be sufficient work to keep the Hazmat team working. Although Respondent had laid off employees in the past for lack of work, McIntosh testified that Respondent did not consider the option of laying off some employees, and retaining those employees for whom work would be available.

During the year 2001, Powell testified that the four vendors combined removed 500 pieces of hazardous material. According to Powell, that amount of work would have kept two members of the Hazmat team busy full time.

IV. ANAYSIS

A. The 10(b) Issue

Respondent contends that the entire complaint should be dismissed based on Section 10(b) of the Act.

In that regard, the 10(b) period commences only when a party has clear and unequivocal notice of a violation of the Act. *Carrier Corp*., 319 NLRB 184, 190 (1995); *Leach Corp*., 312 NLRB 990, 991 (1993); or where a party in the exercise of reasonable diligence should have become aware that the Act has been violated. *Moeller Bros. Body Shop*, 306 NLRB 191, 192-193 (1992); *Oregon Steel Mill*, 291 NLRB 185, 192 (1988). The burden of showing such clear and unequivocal notice or lack of diligence is on the party raising the affirmative defense of Section 10(b). *Paul Moeller Co.*, 337 NLRB No.124, slip. op. at 2 (2002); *Carrier* supra; *Chinese American Planning Council*, 307 NLRB 410 (1992).

In my view, Respondent had failed to adduce sufficiently probative evidence to meets its burden of proof either that the Union had clear and unequivocal notice of a violation of the Act or that in the exercise of reasonable diligence it should have aware that the Act has been violated.

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that George was terminated, along with other team members.

[26] In this regard, Respondent introduced no evidence establishing what salaries were paid by the vendors to their employees performing the removal of hazardous material.

Respondent argues initially that although Local 1108 filed the charges, the knowledge of the Hazmat team should be counted for purposes of the 10(b) period, since they are the persons who claimed to be aggrieved by Respondent's conduct. *Wisconsin River Valley District Council*, 211 NLRB 222, 227 (1974), enfd 532 F.2d 47 (7th Cir. 1976); *Goodyear Tire & Rubber Co.*, 312 NLRB 674, 689 (1993). I disagree.

The violation alleged here is Respondent's refusal to apply its collective bargaining agreement to the Hazmat employees, in violation of Section 8(a)(1) and (5) of the Act. The aggrieved party is the Union as the party to the contract, although the employees are also in direct beneficiaries of the contracts terms. Thus for purposes of 10(b) knowledge of the employees that have not covered by the contract is not attributable to the Union. *Amcor Division of ALF Industries*, 234 NLRB 1063 (1978). Neither of the cases cited above suggest a contrary conclusion, and are clearly inapposite.

Respondent also argues that the Union was aware of the existence of the Hazmat team, by virtue of the evidence that shop stewards for the CWA, were aware of the team, had complained to D'Eletto about how the team performed its work, and that shop stewards inquired about the team at MOP meetings, and were told that they were employees of Win-Pay. Further Respondent contends, that the team members at various times wore badges which stated "nonemp" on them.

Based upon the above evidence, Respondent contends that the Union through its shop stewards knew or should have known about the violations alleged. Once more, I disagree.

Such evidence falls far short of establishing clear and unequivocal notice of the violations alleged. It establishes only that shop stewards were aware that a group of individuals, identified as contractors employed by Win-Pay were performing work, that might be construed as unit work. However, the violation here is not unlawful subcontracting, since subcontracting is permitted under the contract in certain circumstances. The claim is that these employees were in reality employees of Respondent, while being held out as employees of the subcontractor, and that they should have been covered by the contract. There is no evidence whatsoever, that any shop steward became aware of the fact that these employees were really employees of Respondent, because of various facts such as supervision, hiring, raises, promotions, demotions, etc. Since this is the essence of the violation alleged; Respondent had not established any notice of the violation, much less clear and unequivocal notice on the part of the Union, through its shop stewards.

There is also some evidence in the record, that shop stewards were also informed that the Hazmat team were "Bell Atlantic employees." However, this evidence is also insufficient to establish clear and unequivocal notice of the violation. Thus, the evidence discloses that Respondent had dozens of central offices throughout New York State, and the Hazmat team worked in all of them as needed, with no set schedule. Thus stewards would often see people whom they did not recognize and would not necessarily know whether they were covered by a contract, even if it became aware that they were employees of Respondent.

Respondent also argues alternatively that the Union failed to exercise reasonable diligence in learning about the Hazmat team. It asserts that the Union maintains of force of 75 chief stewards and 1000 stewards to police the contract and make sure that non-employees are not performing unit work. Therefore Respondent contends that the Union should have made further inquires about the Hazmat team and found out about the fact that it was doing unit work, and they were Respondent's employees. However, again I emphasize that the violation here is not unlawful contracting out, so the evidence of vigorous enforcement of alleged subcontracting

violations of the contract is irrelevant.

There is not a scintilla of evidence that the Union was or should have been aware that Respondent was using Win-Pay as a payroll service only, and that it was really the true employer of these employees. The Union stewards did exercise due diligence by inquiring at MOP's about the employer of the team. It is not reasonable to conclude that the stewards should have made further inquiries into the status of the employment relationship of the team with the contractor, and whether in fact Respondent exercised such control over their conditions of employment to be considered their employer.

Therefore I conclude that Respondent had failed to meet its burden of proving that the Union had clear and unequivocal notice of the violations alleged or that if it had exercised reasonable diligence, it would have become aware that the Act was violated. *R.G. Burns*, 326 NLRB 440-441 (1990) (Fact that "suspicions" that the Act was violated prior to the 10(b) period insufficient to establish knowledge of violation or lack of diligence); see also *Amcar Division* supra where the Board observed as follows:

> But even if the circumstances had been such that it was more likely that the employees would have known that nonemployees were doing their work, that evidence would not be a sufficient basis for inferring that the Charging Party had notice of unlawful subcontracting. For where, as here, the rights of parties to use our processes are at stake, we have long applied a more stringent test for determining when a party has notice of a possible infringement of its rights.

Id. at 1063.

I shall therefore based on the foregoing reject Respondent's 10(b) defense [27]

B. Deferral of Arbitration

Respondent contends that the instant complaint should be deferred to the parties arbitration machinery, since the parties have a long and productive collective bargaining relationship, there is no claim of employer hostility to the exercise of protected rights, the contract provides for arbitration of a wide range of disputes, including encompassing the dispute here, the employer has expressed a willingness to arbitrate, and the dispute is suited for arbitration, *Collyer Insulated Wire*, 193 NLRB 837, 842 (1971); *United Technologies Corp*., 268 NLRB 557, 558 (1984).

However, it well settled that disputes involving accretion are not suitable for arbitration since they involve application of statutory policy rather than contractual interpretation. *Progressive Service Die Co*., 323 NLRB 183, 187 (1997); *J.E. Higgins Lumber Co*., 322 NLRB 1172,1176 (2001); *St. Mary's Medical Center*, 322 NLRB 954 (1997); *Williams Transportation*

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[27] Respondent also argues that if it is found that the 8(a)(5) charge is time barred, as it asserts, the 8(a)(3) and (4) allegations which arise out of that charge must also be dismissed. Respondent is clearly incorrect in this contention. Even if I were to find that the 8(a)(5) charge is barred by 10(b), such a finding would have no affect on the clearly timely 8(a)(3) and (4) charges. In that event the pre 10(b) evidence can be used as background evidence, to establish motivation for the layoffs and terminations inside the 10(b) period.

Co., 233 MNLRB 837, 838 (1977).

While Respondent does not dispute this well settled precedent, it argues that the Board should disregard these principles, because the accretion claim was an after-thought, added by General Counsel, after it received Respondent's answer raising deferral as an affirmative defense. It adds that since the contract coverage theory is General Counsel's primary theory, General Counsel is merely aiding the Charging Party in "forum shopping" to avoid an arbitration it could not have won.

I reject Respondent's contentions. Regardless of when and how or why General Counsel decided to include the accretion issue in the complaint, the fact is that the complaint was properly amended, and the issue is before me. Therefore the established precedent, cited above is dispositive, and require dismissal of Respondent's deferral affirmative defense.

Moreover, it is equally well settled that allegations of an employer's violation of Section 8(a)(4) of the Act will not be deferred to arbitration. *PGC (USA) Mineral Sands Inc*., 322 NLRB 1633, 1644 (2001); M & B Contracting Co., 245 NLRB 1215, 1231 enfd 653 F.2d 245 (6th Cir. 1981); Filmation Associates, 227 NLRB 1721, 1722 (1977).

Here the complaint alleges that the layoffs and termination of the Hazmat team is violative of Section 8(a)(1) and (3) and (4) of the Act. Since 8(a)(4) allegations are closely intertwined with the 8(a)(3) allegations, as well as with the 8(a)(5) allegations of refusal to include these employees under Respondent's contract, it is not appropriate to defer any part of the instant complaint. *Food & Commercial Workers Union*,325 NLRB 908 (1998); *International Harvester Co*., 271 NLRB 647 (1984); *Filmation* supra

Accordingly, I reject Respondent's affirmative defense and shall not defer any part of the instant case to arbitration.

C. Employee Status of the Hazmat team

Respondent can be found to an employer of the Hazmat team if it is established that it "meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline supervision and direction." *TLI Inc*., 271 NLRB 798 (1984), *NLRB v. Browning Ferris Industries*, 1122 691 F.2d 1117, (3rd Cir. 1982); enfg. 259 NLRB 148 (1981*); Riverdale Nursing Home*, 317 NLRB 881, 885 (1995); *Continental Winding Co*. 305 NLRB 122, 135 (1991).

There can be little doubt that the evidence is overwhelming that Respondent's conduct vis a vis the Hazmat team more than meets this definition.

Thus Respondent's representatives, primarily Bill Warren interviewed and hired the members of the team. Most employees were recruited by word of mouth, but significantly employee Lana found out about the job from the Department of Labor which listed the employer as TRG. Indeed when the employees interviewed for the position, it took place at Respondent's facility, and they believed that they were being hired by the phone company. It was only several days later, when they filled out various forms, that they were informed that they would be paid by Butler, the previous payroll service.

It was Respondent who determined the initial rate of pay for their Hazmat team, as well as subsequent raises and salary reductions for the employees. It is highly significant that when McIntosh took over responsibility for the overall supervision of the team,1998, he was quite surprised and unhappy about this procedure. He complained about it, in view of his recognition

that ordinarily, it is contractors who determine the wages for employees supplied to Respondent by such contractors, McIntosh was informed that this is the way it has always been done.

Respondent's representatiives also determined other pay related matters such as overtime, night differential hours, and expense reimbursement. In this regard, after McIntosh took over, he changed the expense reimbursement policy for the team. so that it would conform to the policy that applied to all of Respondent's employees.

McIntosh also changed the work schedule of the team from 10 hour days per week, to five 8 hour days, because these were the hours worked by other employees that he supervised. Most significant of all, in June of 1999, McIntosh informed the team that all accumulated comp time must be used by certain dates, and added, "we value all our staff members, but we must warn you formally, due to the company procedures associated with estimates, all comp time must be used to comply with the policy of the "Accounting Department" (Emphasis Supplied).

The evidence also disclosed several instances where Respondent's representatives promoted and demoted employees and suspended and otherwise disciplined them for poor performance, including a temporary reduction in an employees salary.

The members of the Hazmat team all received specialized training to learn the skills for their jobs. This training was arranged for and paid by Respondent.

Moreover, the record disclosed that numerous forms such as MOP's and 5099's were signed by members of the Hazmat team as representatives of Respondent. Further the MOP forms contain a contact list which is made available to employees at the site where work is performed and is often posted at these sites. These lists contain names, and phone numbers and job titles of various officials of Respondent, including at times Warren, Powell, Barnes and McIntosh, and also includes members of the Hazmat team, with their titles listed as field representatives, technicians or field supervisor. These lists are entitled NYNEX or TRG "Integrated Technical Services Contact List", and gives no indication thereon that anyone on the list are not Respondent's employees or are employed by contractors.

Additionally, when Respondent applied for its radioactive license, it submitted documents to the State, reflecting that "*NYNEX Enterprises employees*" will perform low level radioactive tube removal packaging and transportation."

Also, some members of the Hazmat team, unlike other contractors, had voice mail at Respondent's facility, where they were identified as a representative of Respondent, had access cards for entrance into Respondent's facilities, use of a company van, possession of a company credit card to fill the van with gas, and had keys to open various central offices.

Respondent also represented that the team were its employees, by its letter to the Port Authority, requesting access to the World Trade Center, for "the below NYNEX employees."

Also notable is McIntosh's E-Mail to his boss Joe Mauro, on October 27, 1999. McIntosh stated that that the Hazmat team, "were recruited by TRG. . . . we supervise, monitor their performance and give them yearly raises." Finally, I also note the testimony of D'Eletto who testified concerning the different procedures used by Chem Nuclear a contractor and the Hazmat team to enter a building. He testified that the Chem Nuclear employees "weren't issued any kind of badges. They were vendors. They were actual vendors. . . . Somebody was always there with them. One of our people was always there with him." D'Eletto later conceded that by "our people" he was referring to the Hazmat team.

Therefore, it is clear and I find the evidence more than sufficient to establish that the Hazmat team were employees of Respondent.

Respondent argues however that Win-Pay, at the very least controlled significant and aspects of the employees' terms and conditions of employment, such as pay, and benefits, that Win-Pay makes all tax and payroll deductions, and that it held itself out as the employer of the Hazmat team. Therefore, Respondent argues that the evidence discloses that Win-Pay is at least a joint employer of the team, and since the complaint does not allege joint employer status, the case ends there. I cannot agree with Respondent's position in this regard.

Initially, I note that notwithstanding the absence of an allegation in the complaint that Win-Pay and Respondent were joint employers, that issue was fully litigated and briefed by the parties. The complaint merely alleges that Respondent is an employer of the Hazmat team, and does not necessarily exclude the finding that it is also a joint employer of the team. As long as Respondent is found to be an employer of the team, and that the team is employed by Respondent, that is all that is necessary to make it potentially liable for the unfair labor practices alleged in the complaint. Cf. *People Care, Inc*., 311 NLRB 1075, 1077 (1993). (representation case where the absence of an allegation of joint employer status was deemed irrelevant, although the record disclosed evidence of same. Thus the Board found employer status as to one employer, without passing on whether the Employer was a joint employer with vendors.)

Therefore, I need not and do not decide whether or not the evidence is sufficient to establish that Win-Pay is a joint employer with Respondent of the Hazmat team. [28]

To be sure, the absence of a finding of joint employer status could have an effect on the remedy ordered, should I find an 8(a)(5) violation as alleged. *Tree of Life d/b/a Gourmet Foods*, 336 NLRB No. 77 (2001) (Remedy for refusal to apply contract to employees by joint employers, requires Employer to apply the contract provisions to the employees only to the working conditions that the Employer controls.) However, in view of my conclusions detailed below that Respondent has not violated Section 8(a)(1) and (5) of the Act, a decision as to Win-Pay's joint employer status is unnecessary.

I also am cognizant that in joint employer relationships in which one employer supplies employees to their other, both joint employers are liable for unlawful employee terminations only where the nonacting joint employer knew or should have known that the other employer acted for unlawful reasons, and the former employer acquiesced in the unlawful action by failing to protest it or exercise any contractual right it might possess to resist it. *Capitol EMI Music*, 311 NLRB 997, 999-1000 (1993). However, since Win-Pay had not been named as a Respondent in this complaint, I need not decide these issues. In the instant case, it is clear that Respondent was the decision maker in both the layoffs and terminations of the Hazmat team, so the issues set forth in *Capitol EMI* supra, are not relevant.

I do conclude as noted above, that the evidence is compelling that Respondent is and has been an employer of the Hazmat team, since its inception in 1989, and that the employees at all times have been employees of Respondent.

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[28] However, I do note in this regard that the fact that an employer issues pay checks and W-2 forms to employees, may not be enough to establish joint employer status *Riverside Nursing* supra at 882.

In arguing that General Counsel had failed to prove even joint employer status with Win-Pay, Respondent relies on the alleged supervision by Quildon and later George of the team by Win-Pay employees. However, I conclude that the evidence falls far short of establishing that either Quildon or George were supervisors under Section 2(11) of the Act, but instead that they were at most leadman. The instead overwhelmingly evidence demonstrates that the team was supervised by officials of Respondent including Warren, D'Eletto, Powell (after her promotion to a supervisory position with Respondent), Whiting and McIntosh.

Respondent also argues that Win-Pay controlled pay and benefits. However, although Win-Pay did determine benefits, such as medical coverage, 40-1-K, and vacations, and issued pay checks, it was Respondent that decided on all pay raises, reductions, night differentials, overtime, and expense reimbursement, and simply directed Win-Pay to pay employees what Respondent deemed appropriate. While Win-Pay did determine benefits, I note that when Win-Pay took over, and announced that unlike Butler, the prior payroll service, it would not provide paid vacations, it was Respondent, through Warren that substituted a compensatory time benefit for this loss of vacation pay for the team.

Accordingly, based on the foregoing analysis and authorities, I conclude that Respondent was an employer the Hazmat team, and that the members of the Hazmat were at all times employees of Respondent.

D. The Alleged Violations of Section 8(a)(1) and (5) of the Act.

General Counsel and Charging Party contends and the complaint as amended alleges, that Respondent violated Section 8(a)(1) and (5) of the Act, based on two alternative theories. First it is asserted that the Hazmat team was performing bargaining unit work covered by the TRG contract, and that Respondent has violated Section 8(a)(1) and (5) of the Act by failing to apply the contract to these employees. *Gourmet Foods* supra; *Moeller Bros*. supra; *General Equipment Co.*, 297 NLRB 430, 434 (1989);*Water's Edge*, 293 NLRB 465, 470 (1989); *Meyers Café & Konditorei*, 282 NLRB 1 (1986).

Alternatively, it is argued that if the Hazmat team is not found to be in the unit, that they should be accreted either to the TRG contract or to the plant contract. *United Parcel Service*, 303 NLRB 326 (1991), enfd. 17 F.3d 1518 (D.C. Cir. 1994); *Mercy Health Services*, 311 NLRB 367 (1993); *Reliable Trailer & Body Inc., 295* NLRB 1013, 1018 (1989).

Respondent argues initially that the 8(a)(5) violations based on either theory must be dismissed, because the Union never made a demand on Respondent to either accrete the Hazmat team to the existing units or to that they should be covered by the TRG contract. *Color Tech Co.*, 286 NLRB 476 (1987) *K & S Circuits*, 255 NLRB 1278, 1298 n.59 (1981); *Progressive Serve Die Co.* 323 NLRB 183, 187 (Date of demand triggers violation based on accretion).

However, the evidence discloses that the Union did make a demand on Respondent that the Hazmat employees be covered by the contract. Thus, after the charge was filed, Welker received a call from Jeff Weiner, Respondent's Director of Labor Relations. After chastising Welker for filing the charge, prior to giving Weiner a "heads up," Weiner asked what the Union was looking for? Welker responds "bring them into the contract. We feel they are employees."

Weiner then informed Welker that he would have to speak with David Rosenzweig, Respondent's Regional President for Network Services. During this conversation, Welker also told Rosenzweig that the team should be part of the CWA contract.

I conclude that Welker made appropriate demands upon Respondent in both of these conversations. Respondent contends that these demands are not appropriate since they do not specify which legal theory the Union is pursuing or even which contract it believes should cover these employees. *Color Tech* supra. I disagree.

A union's bargaining request need not set forth the Union's theory of why it believes the employees should be covered by the contract. *Northern Montana Health Care*, 324 NLRB 752 Fn.4 (1997). Here the Union put Respondent on notice that it was seeking to include the employees under its contract, which is all that is required.

It is true as Respondent points out that the Union did not specify which contract it believes covers the employees. While it would have been preferable for the Union to do so, I find that the failure to do so is not fatal to the Union demand. It is clear that Respondent was made aware that the Union was demanding that it cover the Hazmat employees in a contract. In the circumstances here, there is no evidence that any alleged confusion about the contract requested, was in any responsible for Respondent's failure to agree to the Union's demand. At the very least, the Union's demand shifted the burden to Respondent to seek clarification of the bargaining demand. *Hydro Lines Inc*., 306 NLRB 416, 420 (1991). Moreover, any doubt that Respondent may have as to the bargaining unit sought by the Union was removed when the complaint issued setting forth the unit alleged to be appropriate. *Hydro Lines* supra Fn. 29 and cases cite therein.

Finally, the charge itself was tantamount to a valid demand by the Union, *Overnite Transportation Inc*., 306 NLRB 237, 239 (1992); Sterling Processing Corp., 291 NLRB 237, 239 (1992).

I therefore reject Respondent's assertion that the Union failed to make an appropriate demand that Respondent cover the Hazmat team.

I now turn to an examination of the alternative theories alleged by General Counsel to establish a refusal to bargain violation. With respect to primary theory, it is asserted that the employees were and have been part of the TRG contract, and should be designated as material technicians. General Counsel relies heavily on the testimony of Mancini that material technicians are the "ones that touch any type of equipment," as well as an admission by Respondent's labor relations representative, Edward Simmons, which allegedly concedes that the CWA represents employees who handle telephone equipment. I find the reliance on this testimony to be misplaced and find such testimony not to be probative of whether or not the Hazmat team was covered by the TRG contract.

The fact is that the contract does not specify that it covers employees who handle telephone equipment as General Counsel asserts, but merely covers employees whose occupational classifications are specified, including material technicians. Therefore the testimony of these witnesses, is in effect parole evidence, who cannot be used to vary the terms of the contract, unless the agreement is ambiguous. *America Piles Inc*., 33 NLRB 1118, 1119 (2001); *Don Lee Distributors*, 322 NLRB 470, 481 (1996). There is no ambiguity as to the meaning of the recognition clause, so that testimony introduced to vary that clause, by in effect arguing that the parties meant to cover all employees handling phone company equipment is neither admissible nor probative.

Moreover, the alleged admission by Simmons does not even establish what General Counsel needs to prove. Thus Simmons was asked by General Counsel whether Respondent's employees who are not covered by the CWA, such as managers, account reps or engineers,

handle telephone equipment? He responded no. General Counsel then asked, "so all employees who handle telephone equipment are CWA represented?" Simmons responded that there are associates, such as operators who also handle equipment, who are represented by the CWA Local 1101.

Therefore this testimony does not establish that there is any contract or unit, which covers employees "who handle equipment." Respondent has several different contracts, with different locals of the CWA, covering different classifications of employees. General Counsel alleges that Respondent failed to cover the Hazmat team under the TRG contract as a material handler. Thus, whatever employees that the CWA generally or other locals in particular represent in other units is immaterial.

What is material is what kind of work material technicians perform, and whether the Hazmat team performed the same work and therefore should be included under the contract that covers these employees.

I find that General Counsel has fallen far short of its burden to prove that the Hazmat team perform the same work as material technicians. In this regard, General Counsel and Charging Party contend that this work had historically been performed by CWA members. This assertion is not accurate. Although the work performed by the Hazmat team, i.e. the purging of hazardous materials from frames was performed, at least in part by employees of Western Electric, represented by the CWA, prior to the divesture of AT&T in 1984, this fact is not significant. Initially, I note that the record does not establish the contract language between Western Electric and the CWA, nor the classification of the employees performing the work in question prior to 1984. More importantly, once divestiture occurred, AT&T was broken up, and various new companies were formed, with various mergers and consolidations over the years, resulting in Verizon and TRG, as well as numerous other phone companies. Therefore, I conclude that evidence of predivestiture work performed by Western Electric is not probative of whether the work should be covered by Respondent's current contract with the CWA.

Materials Technicians primarily install, remove or modify equipment on frames. They are generally responsible for frames and not for purging hazardous material from frames. At times however the record discloses that the material technician will remove some equipment that contains hazardous material, primarily circuit packs, to reuse that equipment on another frame or place it in storage. This is substantially different from the work of the Hazmat team's work, where they remove the circuit pack in order to purge the mercury relays on the pack [29]

The material technicians do not perform the work performed by Hazmat team as part of their normal function; purging hazardous materials, boxing them up, and disposing of the materials through an appropriate vendor. In that regard the Hazmat team receive extensive and regular training concerning how to handle any dispose of hazardous materials, which the material technicians do not receive. The skills involved in the two jobs are not the same, a fact which is admitted by testimony of union officials.

The Hazmat team also performs work of observing the removal of batteries by vendors and inspecting jobs to determine the extent of removal required. There is no evidence that material technicians perform this kind of work.

[29] Indeed, not all circuit packs contain mercury relays, the material which the Hazmat team was concerned about.

Historically the material technicians have never performed the work of the Hazmat team, and the Union has never demanded (until the instant charge) that this work be covered by the contract. It is also significant that none of the Hazmat team members performed any of the work performed by the material technicians covered by the TRG Control.

Furthermore, I note the fact that when the Union found out about the Hazmat team, it sought to organize the employees by obtaining authorization cards from the team members, rather than asserting that they are covered by the contract, filing a grievance to this affect. I find this to be an implicit admission that the Union did not believe that the employees were covered by the contract. I note in this regard that the Union was aware of the employment status of the workers, and had been informed that the team cponsidered themselves to be employees of Respondent, when it nonetheless sought to organize them by obtaining authorization cards.

I therefore conclude that based on the foregoing, particularly the bargaining history of this work, coupled with differences in skills and types of work performed by the Hazmat team and material technicians, that General Counsel has not established that the Hazmat team should have been included in the TRG contract. *Edewald Construction Co.*, 294 NLRB 297; 298-299 (1989).

Further support for my conclusion that Respondent has not violated Section 8(a)(1) and (5) of the Act, by failing to include the Hazmat team in its contract with the Union, can be found in the application of the "sound arguable basis" doctrine. Thus where the complaint alleges that the Employer violated the parties contract, and the issue involves interpretation of the contract, it is not enough for the General Counsel to prove that its interpretation of the contract is more appropriate. Where the Employer acts pursuant to a "plausible interpretation" of the contract, or has a "sound arguable basis", for its position, the Board will not find a violation of the Act. *Yellow Freight Systems*, 313 NLRB 309, 331 (1993); *Westinghouse Electric Corp*, 313 NLRB 452 (1993), *Crest Litho Inc*., 308 NLRB 108, 110-111 (1992), *Thermo Electron Co.*, 287 NLRB 820 (1980) *NCR Corp*., 271 NLRB 1212, 1213 (1984).

Thus here the best that can be said for General Counsel and Charging Party's position here, is that the inclusion of the team in the unit is "a plausible interpretation", of the contract. But such a contention is not sufficient to establish in violation, since in these circumstances it must prove that its interpretation of contract coverage is the correct one or the only reasonable interpretation of the contract. *Plasterers Local 627 (Josh Hart Concrete*), 274 NLRB 1286, 1287-1288 (1985).

Furthermore, *Gourmet Foods* supra, cited by Charging Party in support of finding a violation, is actually more supportive of dismissal. Thus, the Board therein found a violation against a joint-employer Respondent for failing to cover employees supplied by a temporary agency under contract with a Union. However, significantly the Board made the finding that the temporary employees were "in positions that are within the plain meaning of the contractual unit description (driver and warehousemen.)" Id. slip op p. 2-3.

It emphasized the broard and unequivocal language of the contract compelling the inclusion of newly hired employees in the unit, and distinguished the circumstances from cases, as here, where the employees are not plainly included in or excluded from the established unit. The Board observed that "in such cases, disputes concerning the unit status of employees in the new classifications are resolved through unit clarification proceedings." Id. at slip op p.3.

Accordingly, the Board seems to be requiring that cases like this one, where the employees involved are not specifically included or excluded from the unit description, are more

appropriately resolved by the UC procedure, and not an unfair labor practice proceedings. See also, *Tweedle Litho Inc*., 337 NLRB No. 102 (June 13, 2002); *Premcor Inc*., 333 NLRB 1365, 1366 (2001) (UC proceeding to decide if employees performing same basic functions as a unit classification is properly viewed as in the unit).

Accordingly, based on the foregoing analysis and authorizations I conclude that the complaint allegation that Respondent violated the Act by failing to include the Hazmat team under the TRG contract must be dismissed.

Turning to the alternative accretion theory urged by General Counsel and Charging Party, Respondent argues that this must be dismissed because accretion is inappropriate, because the Hazmat team has historically been excluded from the bargaining unit. *United Parcel Service*, 303 NLRB 326, 327 (1991), enfd. 17 F.3d 1518 (D.C. Cir. 1994); *Laconia Shoe Co*., 215 NLRB 573, 576 (1974). I agree.

Accretion cannot be found where "the group sought to be accreted has been in existence at the time of recognition or certification, yet not covered in any ensuing contract, or, having come into existence has not been part of the larger unit to which their accretion is sought or granted." *Color Tech Corp*., 286 NLRB 476, 487 (1987), citing *King Radio Co*., 257 NLRB 521, 526 (1981); *Sterilon Corp*., 147 NLRB 219 (1964), and *Laconia Shoe* supra. Here while the evidence discloses that the Union was recognized prior to their formation of the team, that the Hazmat team has been in existence for approximately 11 years, and has never been made part of the unit, although there have been several collective bargaining agreements executed by the parties. Notably, the limitations on accretion do not require that the Union have acquiesced in the historical exclusion from the unit. "It is the fact of historical exclusion that is determinative." United Parcel supra at 327. See also *Kaiser Foundation Hospital*, 337 NLRB No. 1 (2002) (applying these principles to employees of a temporary agency).

Accordingly, dismissal of this allegation is warranted, without any further discussion of the accretion issue,

However, I do deem it appropriate to consider this issue, in the event that it is concluded that the historical exclusion of the team from the units is insufficient to defeat the accretion claim. In this regard the Board has "followed a restrictive policy" towards finding accretion, since it forecloses the employees' basic right to select their own representative. J.E. Higgins Lumber, 332 NLRB 1172, 1173 (2000); *Towne Ford Sales*, 270 NLRB 311 (1984); *Melbet Jewelry*, 180 NLRB 107, 110; *Archer Daniels Midlands,* 331 NLRB 673, 675 (2001).[30]

The Board will find an accretion only when the additional employees have little or no separate group identity. . . and when the additional employees share an overwhelming community of interest with the preexisting unit to which they are accreted." *Giant Eagle Markets Co*., 308 NLRB 206, *Compact Video Stores*, 284 NLRB 117, 119 (1987). In determining whether the employees show such an overwhelming community of interest, the Board considers

[30] General Counsel argues that a finding of accretion will not deprive the employees' of their right to choose their own representative, since they have signed authorization cards on behalf of the CWA. I disagree. It was the Union's decision to forego using the cards to file a petition with the Board or use the processes of voluntary recognition with Respondent. It chose to use the unfair labor practice charge route instead. In my view, the existence of the cards has little or no bearing on the accretion issue, and that the Board's restrictive policy with respect to accretions is still applicable.

a number of factors, including the degree of interchange, common supervision, integration of operations, geographic proximity, similarity of working conditions and skills and functions, common control of labor relations, and collective bargaining history. *Archer Daniels* supra; *Compact Video* supra. Employee interchange and common supervisor are the two most important factors. *Towne Ford* supra.

Here, these two most important factors, are not present. There is no evidence of any interchange between the Hazmat team and bargaining unit employees included in either the TRG or the plant contract. Moreover there is also no evidence of any common supervision. The team is supervised by Powell and McIntosh, and previously by Warren. There is no evidence that these individuals supervised any CWA employees. Nor is their any evidence that any supervisors of unit employees supervise the Hazmat team, in any way.

Further there is little evidence of integration of operations. The Hazmat team perform a unique function of purging hazardous materials from frames, which is performed without assistance from or substantial direct contact with unit employees. When the team removes the hazardous material, it cordons off the area that is working in, and unit employees are not allowed in the area, except for certain brief and exceptional circumstances. While there is some evidence that at times, unit employees will be working on the same frame at the same time as the Hazmat team, this is not a normal occurrence, and when it occurs, the unit employees are performing a different function. Further, part of the unit, namely the field representatives, do not work with or near unit employees regularly, since they survey jobs and interact mainly with engineers and other non unit personnel. While at times, when performing the function of overseeing battery removal, a power tech (a unit position), will also be present, this is not sufficient to establish an integration of operations with unit employees. See *Dennison Mfg*., 296 NLRB 1034, 1037 (1989). (day to day contact with unit employees simply reflects the place of assignment rather than a community of interest with those unit employees, particularly where skills and functions are different.)

As for geographic proximity, the Hazmat team worked in different central offices throughout the state, and not in proximity to any particular group of unit employees. While the CWA employees also work in central offices, they are generally assigned to particular offices, and do not travel from office to office, as do the Hazmat team. Further, at times the Hazmat team work in abandoned central offices, or an unoccupied floors. Further as noted above, the work area of the team is cordoned off, and demarcated by “keep out” signs, because of the hazardous materials they were handling.

As discussed above with regard to contract coverage, there is little or no similarities between working conditions, skills and functions of the Hazmat team and CWA represented employees. The team performed a unique environmental function, which required specialized skills and training, which no unit employees possessed.

While there is some similarity with rip out work, which has been performed at times by unit employees, even that function is significantly different from removing hazardous materials, in view of the special skills and training required for the latter function. Moreover, the evidence discloses that rip outs have not been regularly performed by unit employees. That work has contracted out for the most part, except for a brief period in the 1990’s, when an agreement was reached between the Union and Respondent, permitting unit employees to perform rip outs on a temporary basis.

There is no evidence of any common control of labor relations, between unit employees and the Hazmat team. Benefits have been decided upon and controlled by the temporary

agency involved, and although as noted above, I have found that Respondent's officials controlled the team's day to day working conditions, including wages, I again emphasize that these officials do not supervise or control any labor relations matters for unit employees.

Finally, as also related above, bargaining history reveals that the Hazmat team has never been covered by a CWA contract, and that the CWA was never made a demand during negotiations that the Hazmat team be covered by either contract.

Accordingly, based upon the foregoing analysis and authorities, that General Counsel had fallen far short of establishing either that the Hazmat team have little or no group identity or that the team shares an overwhelming community of interest with either bargaining unit. Therefore, I shall recommend dismissal of this allegation of the complaint as well, and conclude that Respondent has not violated Section 8(a)(1) and (5) of the Act.

IV. The Layoffs and Terminations

The Complaint allegations with regard to the layoffs and terminations of the Hazmat team must be evaluated under the standards of Wright Line, 251 NLRB 1083 (1980).

In that regard, General Counsel has made a strong and compelling prima facie showing that protected conduct, including the filing of charges at the National Labor Relations Board, was a motivating factor in Respondent's decision to layoff the Hazmat team in May of 2000, and then terminate them in late December.

The record discloses that once the employees found out that they were considered employees of Butler, they began complaining among themselves and to Warren about wanting to become phone company employees and to get into the Union. Initially, Warren informed them that the job was not a union position, because it was only temporary, lasting a year to a year and a half.

Subsequently, after the year and a half went by, the employees resumed their complaints to Warren about becoming NYNEX employees and getting into the Union. Warren would tell them that he was trying to get them into the Union, but higher ups were not going along.

After McIntosh took over supervision of the team in 1998, the employees continued their complaints to him about becoming employees of the company and getting into the Union. These complaints were made to McIntosh at weekly meetings and McIntosh would tell them that he was working on it and would try to get the employees into the Union one or two at a time.

In fact, the record discloses that McIntosh had mislead the employees. He was not working on getting them into the Union or into the Company, but instead was working on terminating them, by subcontracting the work to hazardous materials vendors.

Indeed, McIntosh's own testimony concedes that shortly after he became in charge of the team, he began to implement a tentative decision to change contractors, and the evidence is overwhelming that this decision was motivated by the employees' complaints about their employment status and the failure of Respondent to put them into the Union.

The E-Mails written by officials of Respondent, including McIntosh himself constitute compelling evidence of this conclusion. Thus McIntosh's memo of October 27, 1999 to his boss, Joe Mauro is entitled "Co-Employment Issue". In that memo, he summarized the history

of the team, and added "of late the contractors are disgruntled, they think that they should be receiving benefits like any other Bell Atlantic workers because they were contracted by TRG, and not through an Agency, only that their checks are issued by the Agency." The E-Mail further concluded, "Based on the above concerns, Sourcing Compliance and I reflected on the issues and determined that it would not be in the best interest of Bell Atlantic to continue under the present system of supervision."

Within a week, another E-Mail reflecting a meeting of various managers, including Powell and McIntosh, was prepared by Alvar Mora. The E-Mail reflected the walk through that had taken place with the project engineer, where issues concerning the use of outside vendors to purge hazardous materials was discussed. The E-Mail concluded, "since the driver for this project is the temporary labor force currently performing the work and the potential for exposure to co-employment lawsuits, the RFI, RFP and SOW documents will be changed to focus on replacing the current payroll agency provided labor team with a independent contractor".

This compelling evidence of Respondent's motivation is further strengthened by the admissions of McIntosh and Powell that they were aware of the "Microsoft" issue at the time, i.e., that Respondent could be held liable as was Microsoft, as a co-employer of the employees, and Powell's admission that Respondent's concerns about co-employment was "a reason" for its decision to get rid of the team.

Respondent argues that since the tentative decision to change to outside contractors was made in 1999, well before the charge was filed, the charge cannot be found to be a motivating factor of the layoff or the termination. I do not agree.

I conclude that the above evidence establishes that Respondent had tentatively decided to change to a hazardous material contractor, because of protected concerted and union activities of the Hazmat team. Even apart from the fact that the employees were requesting to become union members, their attempts to become employees of Respondent and to obtain company benefits constitutes protected concerted activity. *Aroostook Tools County Regional Ophthalmology Center*; 317 NLRB 218, 220 (1995); *Meyers Industries*, 281 NLRB 882 (1986). The fact that the employees added that they wished to be put into the Union, constitutes additional evidence of protected conduct.

I therefore conclude that Respondent's tentative decision in 1999 to eliminate the team was motivated by protected activities of the employees.

However, Respondent had not finally implemented the decision, since it was still investigating issues concerning contractors to be used, asbestos abutement issues, and the possibility of shipping hazardous materials to China, when the Union filed its NLRB charge in March of 2000. I believe that this action notified Respondent that the employees had finally done more than merely complain about their non employee and non union status, and had spoken to the Union about the problems. Therefore, Respondent decided to accelerate its tentative decision to terminate the team, because of the charges that were filed.

In this regard, I do not credit the testimony of Respondent's officials Powell, and particularly McIntosh that they were unaware of the fact that the Union had filed charges until after the layoffs were announced. I find it simply not believable that Respondent would not immediately notify the department head that a charge had been filed, alleging that the Hazmat team under his supervision should have been covered by a union contract. Further, McIntosh's testimony that he was not informed about the charges until September, months after that charge, as well as the charge alleging the layoffs to be unlawful, is even more incredible.

I therefore conclude that a compelling prima facie showing has been established that Respondent's decision to layoff the employees in May and terminate them in December, was motivated by the employees engaging in protected concerted activities, including seeking union membership, and the filing of charges by the Union concerning their status. Since General Counsel has made such a strong prima facie showing of discriminatory motivation, Respondent's burden of proof under *Wright Line,* to show by that it would have taken the same action, absent protected conduct, is substantial. Vemco Inc, 300 NLRB 911, 912 (1991); *Edyleon Chocolate,* 301 NLRB 887, 889 (1990*).* In my view Respondent has fallen far short of meeting its burden in this regard.

Both McIntosh and Powell testified that the decision to layoff employees in May of 2000, was based solely on the decision made by Respondent that there was no work for the members of the team. They further aver that the decision was not related to the tentative decision made by Respondent in 1999 to change to an outside contractor. I find this testimony unconvincing and not supported by the record.

Initially, I note that when McIntosh notified McCourt in late May of the layoffs, he informed McCourt that Win-Pays relationship with Respondent could be ending because Respondent was seeking another company that handles hazardous removal, which would result in Win-Pay being phased out as payroll agent. This evidence reinforces my conclusion that Respondent decided to layoff the employees in May, as an acceleration of its prior decision to terminate the entire team, due to the filing of the charges which clearly heightened the possibility of Respondent being found a co-employer of the team.

Significantly, Respondent's evidence allegedly establishing that there was no work for the employees in May was inconsistent with other credible evidence and unconvincing. Thus Respondent did produce documentary evidence, reflecting substantial reductions in the number of items purged by the team in 2000, as opposed to 1999. However that evidence does not reflect figures for May of 2000, and does not show a comparison of items purged in May of 2000. Indeed, the record discloses that much of the reduction in items purged took place after the employees returned to work after the layoff, because of a change in procedure instituted by Respondent.

Thus Respondent is left with the uncorroborated testimony of Powell and McIntosh that there was no work for the Team. However, this testimony is discredited by the credible testimony of George that there was over a month's work of available work at Hempstead where he and other members were working at the time of the layoff, and that power was not a problem for this work.

Powell's testimony to the contrary is not credible, particularly since her testimony about work at 811 Tenth Avenue was discredited by Respondent's records as well as by McIntosh. Thus Powell testified that George and two other employees were working at 811 Tenth Avenue at that time of the layoff, and that "union problems," on that job caused her to layoff these employees. In fact Respondent's records, and testimony of McIntosh and George all establish that there were no union problems on that job in May and that in fact the job did not begin until July, after the employees were recalled.

Respondent's attempt to rehabilate Powell's testimony through the introduction of a self serving, heresay document introduced through McIntosh, allegedly establishing that Powell was merely "confused" about this job, is not convincing. In fact Powell testified consistently and unequivocally about this job, and that it was "union problems", that caused the lack of work for these employees, and their consequent layoff. This testimony was clearly false and

demonstrates the pretextual nature of Respondent's defense.

Further, the testimony of McIntosh and Powell is inconsistent concerning the decision to recall the employees. Powell claims that she received a call from Respondent's attorney and was told to recall the team. McIntosh on the other hand asserts that he received the call from attorney Birkdale and was told "it would be nice", if the team was recalled.

Accordingly, based on the above, I conclude that Respondent has failed to establish that it would have laid off the Hazmat team in May of 2000, absent their protected conduct. Therefore, I find that the layoffs are violative of Section 8(a)(1)(3) and (4) of the Act.

Turning to the decision to terminate the team, caused by its decision to contract with a hazardous material contractor, once more evidence submitted by Respondent is insufficient to meet its burden of proof under *Wright Line.* McIntosh was the primary witness as to this decision, and his assertion that the decision was based solely on his opinion, formed back in 1998, that there would not be sufficient work to keep the team busy, is not credible. His assertion that the decision was not influenced at all by the fact that employees had complained about co-employment issues, is clearly not convincing and is contradicted not only by two E-Mails, including one by McIntosh but by Powell's testimony that the co-employment issue was a reason for the decision. Notably despite several E-Mails introduced into the record by General Counsel and Respondent, which detailed several discussions about using hazardous material contractors, as well as other options under consideration, there is not a single word about any assertion by McIntosh or anyone else for that matter, that there was or would be insufficient work for the Hazmat team.

While Respondent's records do show a substantial decrease in work, by the end of 2000, this was based primarily on Respondent's change in procedure, and that did not even in McIntosh's testimony, motivate the decision. Indeed, it is clear that the decision was made in late 1999, but not effectuated until late 2000, due to various issues, including the attempts to arrange for using plants in China. While the evidence reveals that the decision to use the new procedure to ship to China did reduce the amount of work available, it is undisputed that this had no bearing on the decision to use a hazardous material contractor. That decision had been made previously.

Further McIntosh conceded that no cost analysis was ever made between the cost of using outside contractors and continuing with the present system, thereby demonstrating that cost was not an issue in the decision. What was the issue however was the potential cost to Respondent, should it have to consider the team to be employees of Respondent, and perhaps to have to afford them benefits under the Union contract. I am persuaded that this was the primary factor in Respondent's decision to terminate them.

While as related above, Respondent's evidence did indicate that work had diminished by early 2001, and in my view it is likely that Respondent did not have sufficient work in 2001 to keep the entire team busy. However, I do not believe that this evidence suffices to meet Respondent's heavy burden of proving that it would have eliminated the entire team. I find it more likely that it might have laid off some of the employees due to lack of work. Respondent provided no cogent explanation as to why it did not simply layoff some employees for lack of work, and permit the remaining employees to perform the available work, using the new procedures. The evidence discloses that in 1999, Respondent eliminated three positions due to lack of work, and had also laid off employees when work was not available. Indeed it allegedly temporarily laid off employees in May for lack of work. Its unexplained failure to do so in 2001, and instead terminate the entire team by subcontracting to a hazardous material contractor, can

reasonably be explained by the team's concerted activities.

Support for this conclusion can be found in the fact that when Respondent initially proposed contracting out to a hazardous material contractor, it intended to continue using the team to do the work, but merely change contractors from Win-Pay to a contractor that specializes in hazardous materials work. Indeed, Powell had recommended to McIntosh that even if Respondent contracts with another contractor, that it would be useful to retain at least some of the team because of their skills and experience. Yet Respondent failed to go that route, and McIntosh's explanation for its failure to do so is not convincing. McIntosh asserted that he and other officials discussed this possibility, and concluded that it would not be feasible, because the contractors would not agree to hire the team because of their high salary, and that Respondent has no power to force or compel the vendors to hire anyone. I find this testimony of McIntosh not to be believable and I do not credit same.

Notably, none of the E-Mails introduced into the record mention anything about such a discussion or conclusion. Moreover, Respondent introduced no other testimony from any of the other officials who allegedly came to this conclusion.

Further, I find the assertions made by McIntosh to be inherently implausible. Initially, Respondent introduced no evidence as to the relative salaries paid by the contractors and the salaries of the team. Secondly, even if they were higher, as asserted by Respondent, it does not necessarily follow that the contractors would not, in order to obtrain a contract with Respondent, agree to pay somewhat higher salaries, particularly to obtain experienced and skilled employees. Further, it is certainly possible that the team members might have accepted somewhat lower salaries, in order to retrain their jobs. However, they were not even given that opportunity.[31]

More importantly, Respondent admitted that it did not even attempt to request that any of the contractors used to perform the work, hire all or even any of the team. I find this failure inexplicable, and not explained by McIntosh's dubious assertion that Respondent could not force a vendor to hire anyone. In fact, Respondent had done precisely that when it engaged Butler and Win-Pay, who Respondent asserts were contractors, to pay the team and provide their benefits. There is no reason why Respondent could not in putting out a bid to a vendor, have insisted as part of the bidding process, that the vendor hire at least some of the members of the Hazmat team. If that procedure is not feasible, it certainly could have requested that the vendor do so. It failed to take either of these steps, which it seemingly intended to take in 1999, but chose not to in 2000, after the NLRB charges were filed, demonstrating that the employees had finally taken its desire to become Respondent's employees to another level. I find the connection between these two events not to be coincidental, and to constitute further evidence of Respondent's discriminatory conduct.

Accordingly, based on the foregoing, I conclude that Respondent had failed to meet its burden of proof that it would have terminated the Hazmat team's employment, absent their protected conduct. Therefore, Respondent has violated Section 8(a)(1) and (3) and (4) of the Act. I so find.

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[31] Indeed when Respondent switched payroll services from Butler to Win-Pay, the employees lost vacation benefits, and were afforded reduced medical benefits. Yet they all agreed to continue working at the time.

CONCLUSIONS OF LAW

1. Respondent, Verizon and its subsidiary Telesector Resources Group is an employer engaged in commerce within the meaning of Section 2(2) (6) and (7) of the Act, and is an employer of the members of the Hazmat team.

2. Local 1108, Communications Workers of America, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By laying off the members of the Hazmat team, in May of 2000, and terminating their employment in late December 2000, because said employees engaged in activities on behalf of and in support of the Union, because they engaged in other protected concerted activities, and because NLRB charges were filed on their behalf, Respondent has violated Sections 8(a)(1)(3) and (4) of the Act.

4. The above described unfair labor practices affect commerce within the meaning of Section 2(2)(6) and (7) of the Act.

5. Respondent has not otherwise violated the Act as alleged in the complaint.

REMEDY

Having found that Respondent has engaged in various unfair labor practices, I shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent has discriminatorily laid off and then terminated the employment of the members of the Hazmat team, I shall recommend that Respondent offer them immediate and full reinstatment to their former jobs or substantially equivalent positions of employment without prejudice to their seniority or other rights and privileges and make them whole[32] for any loss of earnings they may have suffered by reason of the discrimination against them. All backpay provided shall be computed with interest on a quarterly basis in the manner prescribed by the Board in F.W. Woolworth Co., 90 NLRB 289 (1050), with interest computed in the manner prescribed in New Horizons for the Retarded, 283 NLRB 1173 (1987).

On these findings of fact, conclusions of law and the entire record, I issue the following recommended.[33]

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[32] The record reveals that Wayne Sebro did not return to work for Respondent after the layoff. However, the record is unclear whether or not he received notice of the recall. Further, it appears that he was included in the termination notice sent by Respondent to Win-Pay. In these circumstances, I shall include Sebro among the employees to be reinstated, and shall leave his reinstatement rights, and back pay entitlement to the compliance stage of this proceeding.

[33] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Verizon and its subsidiary Telesector Resource Group, New York, New York, its officers, agents successors and assigns shall

1. Cease and desist from

(a) Laying off, discharging or otherwise discriminating against its employees, because said employees joined or supported Local 1108 Communications Workers of America, AFL-CIO, (the Union), or because said employees engaged in other protected concerted activities.

(b) Laying off, discharging or otherwise discriminating against its employees, because charges have been filed at the National Labor Relations Board either by said employees, or on their behalf by the Union concerning their employment status or coverage under the Union's contract with Respondent.

(c) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act

2. Take the following affirm acton necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer James Anthony, Garfield Assevero, Richard Casiano, Michael George, Tito Knight, Abimbola Lana, James Pando, Wayne Sebro and Alvin Smith, full and immediate reinstatement to their former positions of employment, or if their positions no longer exist to a substantially equivalent position.

(b) Make the above named employees whole for the discrimination against them in the manner set forth in the remedy section of this decision.

(c) With 14 days from the date of this Order, remove from files any reference to the discharges of the above named employees, and within 3 days thereafter, notify them in writing that this has been done, and that evidence of the discharges will not be used as a basis for future personnel actions against them.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its New York, New York facility copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representatives, shall be posted by the Respondent and maintained by it for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in this proceeding, the Respondent shall duplicateand mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 8, 2000.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

IT IS FURTHER ORERED, that the complaint be dismissed insofar as it alleges violations not found herein.

Dated, Washington, D.C.

_____
Steven Fish
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT lay off, discharge or otherwise discriminate against our employees, because said employees join or support Local 1108 Communications Workers of America, AFL-CIO (the Union), or because said employees engage in other protected connected activities.

WE WILL NOT lay off, discharge or otherwise discriminate against our employees, because charges have been filed at the National Labor Relations Board either by said employees, or on their behalf by the Union concerning their employment status or coverage under the Union's contract with us.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL within 14 days from the date of this Order, offer James Anthony, Garfield Assevero, Richard Casiano, Michael George, Tito Knight, Abimbola Lana, James Pando, Wayne Sebro and Alvin Smith. full and immediate reinstatement to their former positions of employment, or if their positions no longer exists to substantially equivalent positions.

WE WILL make the above named employees whole for the discrimination against them, plus interest.

WE WILL remove from files and reference to the discharges of the above named employees, and within 3 days thereafter, notify them in writing that this has been done, and that evidence of the discharges will not be used as a basis for future personnel actions against them.

VERIZON and its subsidiary
TESESECTOR RESOURCES GROUP
(Employer)

Dated _____ **By** _____
(Representative) **(Title)**

Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov .

26 Federal Plaza, Federal Building, Room 3614, New York, NY 10278-0104

(212) 264-0300, Hours: 8:45 a.m. to 5:15 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (212) 264-0346.